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ABSTRACT

Designed for use by local lawyers and law students who agree to serve as resource persons in secondary school level law-related subjects, this guide has two main goals: (1) to provide law personnel with a brief summary of the law and sample cases for student use on topics of general interest, and (2) to introduce students to a sampling of the methods and materials currently being used in law-related education. Following an introduction, the guide has two main parts. The first consists of summaries and cases on seven topics: the criminal justice system, criminal procedure, free expression, equal protection, religion and constitutional law, family law, and consumer law. The second part contains eight lesson-length excerpts from current, representative law-related education publications. Lessons focus on legal content (such as the elements of a contract), legal concepts, case studies, and a variety of other methods such as moot court, mock trial, role playing, and problem solving. The document concludes with a list of resources for educators, lawyers, and law students for use in secondary classrooms. (LH)

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A Resource Guide on Contemporary Legal Issues . . . for Use in Secondary Education

Phi Alpha Delta Law Fraternity, International

Juvenile Justice Office

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May 1982

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Preface

Phi Alpha Delta Law Fraternity, International, operates a nationwide Juvenile Justice and Delinquency Prevention Program to foster closer relationships between legal professionals and the communities they serve, to improve the teaching of law-related education in the classrooms of our public, private, and parochial schools and thereby to help the youth of America become better citizens. Funded by a grant from the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice, the Fraternity's efforts encompass a variety of activities and strategies to improve communication between the legal and education communities and to foster law-related education.

The Program staff is working to broaden the awareness of the Fraternity's 100,000 members—judges, practicing attorneys, prosecutors, law professors, law students, business and government leaders, and other members of the legal profession—to encourage them to help establish and voluntarily participate in local law-related education (LRE) programs. Besides sponsoring and conducting regional training and information sessions, the Program staff is developing activities and resource materials that will facilitate local working partnerships between legal professionals and educators.

Judges as well as law students have demonstrated their ability to be effective "resource people." The term "lawyer" is used throughout the Guide as a matter of convenience intended to refer to all members of the legal community.

One of the principal benefits derived from PAD participation in LRE is its value at the grass-roots level—in Hometown, U.S.A. We know that the virtues of LRE have been recognized already at the highest levels of government—by Congress and the Executive Branch. It is also understood and supported by national leaders in education and the law.

We feel that local attorneys, judges, and law students will respond if properly approached and if they have the appropriate working tools to enhance their effectiveness. The Fraternity has proven its capability of identifying new potential leaders of LRE within the local legal profession. We are now working to provide supportive written materials that can help such volunteers maximize their involvement.

PAD publishes two resource guides for use by local lawyers and law students who agree to serve as resource persons in helping classroom teachers and students at both the elementary and secondary levels. First, the Fraternity published in February, 1981 "A Resource Guide to Assist Lawyers and Law Students for Participation in Kindergarten Through 8th Grade Law-Related Classrooms." Second, the instant publication will, in our judgement, enable the Fraternity to provide a useful working tool for the secondary level. We visualize that this Guide will be used by local lawyers called upon for assistance by high school teachers. We think it will prove beneficial not only for classroom presentations but also for community legal education and as background material for teachers.

Many highly respected organizations in law-related education have already published materials for secondary students. Accordingly, Part II will present excerpts from some of the leading publications in this field. Finally, the Appendix in the Guide will make special mention of the role fulfilled by the American Bar Association and the Constitutional Rights Foundation as well as a listing of key state LRE leaders throughout the nation.

In addition to the benefits already discussed, there will be other "ripple-effects" we can foresee. Local LRE programs will be facilitated by making the Guide available to lawyers already associated with the education system, such as those who know individual teachers, serve on local boards of education, represent school districts, or are counsel to teacher unions.

Being lawyers ourselves, we are highly cognizant of the lawyer lifestyle, which involves long hours of professional application to legal matters, with little time to master the techniques of communicating with students on legal questions. Thus, we hope that this Guide will provide interesting lesson plan materials and useful hints to the practicing lawyer who wants to help his own and his neighbors' children become better citizens.

It is time now to pay credit where credit is due. Part I of the Guide was written by the Indiana Lawyers Commission under contract to Phi Alpha Delta. This Commission is a component of the Indiana State Bar Association. It coordinates all state-wide programs in law-related education and has also produced many useful publications and program initiatives in the field of law. The writing of the Guide was under the direct personal supervision of Cleon H. Foust, Executive Director of the Commission. We also wish to acknowledge the valuable contribution to this project by William G. Baker, Chairman of the Indiana Lawyers Commission Youth Service Committee. It was Mr. Baker who initially proposed this publication to PAD, having been previously involved in the production of the American Bar Association Attorney's Source Book. He was also involved in the planning of the Guide and in the writing of Part I. In this regard, we also thank Timothy V. Clark, Michael S. Reed, and Catherine O'Conner of the Commission for their valuable contributions to the production of the Guide.

We have also sought and received helpful comments from many organizations and experts in the LRE field. They include the American Bar Association's Committee on Youth Education for Citizenship, The Children's Legal Rights Information and Training Program, The Constitutional Rights Foundation, Law in a Free Society, The National Street Law Institute, and the Social Science Education Consortium. In addition, we received help from

Jennifer Brown, Teri Engler, John Khanlian, Eric Mondschein, Gerard Paradis, Linda Riekes and Isidore Starr.

We are particularly indebted to David M. Schimmel, who is the editor of this publication, author of Chapter 5, Religion and Constitutional Law, Professor at the University of Massachusetts, and Education Consultant to Phi Alpha Delta. Norman Scott, PAD Deputy Director, has also been a key participant in the editing and publishing of this Guide.

Finally we want to give recognition to the Young Lawyers Section of the American Bar Association that inspired this guide through their pioneering Attorney's Source Book in 1973 and their publication, An American Law Sourcebook in 1982.

The contents of this Guide have been copyrighted. However, we are glad to authorize the reproduction of any part of the publication without our written permission, provided it is for nonprofit purposes and that credit is given to the Fraternity for its availability. We welcome comments, criticisms, and suggestions for improvement.

Robert E. Redding, Director
Phi Alpha Delta Juvenile Justice
and Delinquency Prevention Program

The Purpose of This Guide

During the past decade, the idea of teaching about law in the secondary schools has spread to every state in the nation. Simultaneously, increasing numbers of lawyers have been invited by teachers into their local classrooms "to talk to our students about the law." Frequently these lawyers have not been in a secondary classroom since they were high-school students. Although most are quite willing to volunteer their time, few practicing attorneys have kept up to date on the range of legal topics of current interest to students. Fewer still are familiar with the wide range of excellent curricular materials and methods now available for teaching about the law. This Guide is designed for just such attorneys. It is intended for busy lawyers who are occasionally invited to be "resource people" in law classes. It has two goals: (1) to provide attorneys and law students with a brief summary of the law and several cases for student use on topics of general interest, and (2) to introduce them to a sampling of the methods and materials currently being used in law-related education.

In addition to these Introductory Materials, the Guide has two main parts. The first consists of legal summaries and cases on seven topics: The criminal justice system, criminal procedure, free expression, equal protection, religion and constitutional law, family law, and consumer law. The summaries are designed to give lawyers and law students an overview and update on a number of substantive issues of interest to secondary students. The summaries, however, are not intended as student texts or curriculum material. Their style is similar to a legal "hornbook," but, unlike a hornbook or treatise, they summarize each of the major topics in substantially fewer pages.

With each substantive section, there are a number of cases written for students. It is hoped that lawyers will want to use one or more of them in conjunction with their classroom visit—to encourage student participation and discussion and to discourage an over-emphasis on the lecture method. Thus the legal summaries and cases for students are designed as a "springboard" to law-related education: beginning where lawyers are, using methods and materials with which they are familiar, and adapting these for secondary-school use.

The second part contains eight lesson-length excerpts from current, representative LRE publications. Some of the lessons focus on legal content such as the elements of a contract; others focus on legal concepts such as corrective justice. A few use the case-study approach; others illustrate a variety of other methods such as moot court, mock trial, role playing, and problem solving. Part II is designed to introduce lawyers and law students to the variety of texts, topics, and methods that are being used in secondary schools today.

In short, the purpose of this Guide is to encourage and assist lawyers and law students in working with secondary teachers and students. It is intended as a supplement to, not a substitute for, a law-related education curriculum. Some lawyers will want to begin with the familiar case studies approach featured in Part I. Others will want to try some of the alternative methods illustrated in Part II. A few may want to experiment with both. If these methods and materials help lawyers, law students, and judges work more effectively with teachers and students, they will have served their purpose.

Effective Classroom Planning for Lawyers and Law Students

In the past, secondary students learned little about the law that seemed relevant. They memorized the names of historic cases and statutes, the definitions of legal terms, provisions of the Constitution, and many distant details. Little of this was current, and even less related to their lives.

During the past decade this has changed. Today the emphasis is on student participation, on using methods and materials that involve students in discussion, analysis, and debate. The goal is not simply to teach facts but to educate students to think clearly, to analyze problems and to consider alternative solutions. The aim is to reduce juvenile delinquency and to prepare students to become knowledgeable, active, and responsible citizens. Law-related education has become a popular and effective means to achieve these goals. Thus this Guide has been specifically designed to help lawyers and law students assist teachers in educating students to become legally literate participants in the democratic process.

The Guide features the case study approach. This method emphasizes analysis and critical thinking. It looks beyond specific decisions to the principles underlying the law. Because lawyers and law students are familiar with this approach, they can make an especially valuable contribution in helping students analyze and understand the cases included in this Guide.

As the Table of Contents indicates, the Guide is divided into two parts. Part I focuses on seven legal topics of interest to secondary students. Each topic section includes a Summary of the Law and Cases for Students. The summaries provide a quick overview of the law for lawyers and law students; they are *not* designed for student use. While the cases and questions are for students, we do not suggest you try to include all of them in a single class. Rather we have included a range of cases and questions on each topic to illustrate the legal principles you may wish to highlight.

PREPARATION AND PLANNING

Preparation is the key to an effective class session, and a discussion with the teacher is the key to effective preparation. Teachers can meet you after school or perhaps during a lunch or preparation period. A planning meeting at school will give you a "feel" for the classroom, the students, and the setting. If you are unable to meet, arrange a telephone conversation during an unhurried time. During your discussion with the teacher, it is important for you to ask the following questions:

1. *Who are the students?* How many are in the class and what is their age, grade level, and maturity? What do they know about the law? And what are their interests? It is important to relate your presentation to local issues, to what students know, and to questions that interest them.

2. *How will my session fit in?* How will it relate to the course as a whole and to the specific unit the class is now studying? What will the students be doing during the class before and after my session? (You might ask the teacher to send you a course outline and a copy of any materials used in the preceding and subsequent classes.)

3. *What do you want me to cover during my visit?* What are the specific goals of the class? Remember most class periods only last about 40-50 minutes. During that time you cannot effectively focus on more than one legal topic, perhaps only on a few aspects of a topic. Consider what you can do best during the time available.

4. *What will you tell them about my visit?* By carefully preparing the students, the teacher can make maximum use of your time. For example, during the class before your session, the teacher can distribute the facts and issues from one or two of the Cases for Students in Part One. By discussing the facts and debating the issues of key cases, the student will prepare for and anticipate your visit.

5. *Evaluation: Can we discuss the session after the class?* Too often lawyers leave immediately after class without any opportunity to discuss whether the goals were achieved, what went well, and how the class might have been improved. Therefore, you should encourage the teacher to give you "feedback" about your presentation and share your reactions with the teacher. To facilitate this discussion, you and the teacher might agree to fill out and exchange a one-page form on your session identifying (1) strengths, (2) any problems, and (3) suggestions for improvement.

6. *How will you follow up my visit?* Frequently there is no discussion and little thought about following up the lawyer's visit. As a result, much of the impact and potential of your session is lost. How does the teacher plan to build on your visit and how can you help? You might suggest other cases to read, lawyers or court personnel to contact (*e.g.*, to invite to class or to interview), or field trips to make that would add additional realism and depth to the course.

CHOOSING YOUR METHODS

Effective lawyers use a variety of methods in the classroom.

1. *Lectures.* Long lectures have proven to be the *least* effective approach to helping students understand the law. Short lectures (of 5-10 minutes) may be useful to provide background information or to summarize a discussion. But it is important to resist the temptation to outline a 40-minute lecture followed by 10 minutes for questions. If brief lectures are used, they should always be combined with other methods.

2. *The Case Method.* Although the case method and Socratic questioning are not as widely used in secondary schools as in law school, they have become very popular and effective in capturing the interests of teenagers. The case method is most effective in helping students understand that many legal conflicts are not simple matters of right against

wrong but of legitimate rights in conflict. Thoughtful questioning can help students identify the reasons, values, and legal principles that support their views on legal issues *and* the views of others with whom they disagree. (For a full explanation of the goals and features of this approach, see Part II, Section 8, on the Case Method.)

While many law-school teachers leave issues unresolved, "closure" and clarification are important for secondary students. In addition, law-school-type questioning may intimidate students and discourage their participation. Therefore, before questioning students about the issues of a case, explain that you are not looking for a "right" answer but for their reasoned opinions, that your questions are intended to help them clarify their thinking—not to prove them wrong, and that you are discussing issues about which reasonable people (including lawyers and judges) often disagree.

While the Cases for Students in this Guide include the facts, issues, decisions, and their reasons, you may wish to vary the use of these materials. For example, you might: (1) ask the teacher to give out only the facts, and see if students can identify the issues; (2) give out and discuss the full court opinion; or (3) distribute unmarked copies of the majority and dissenting opinions, and ask students to defend the one they think should prevail.

3. *Role-playing, Mock Trials, and Appeals.* In these activities students assume the role of another person and act it out. Role playing helps students understand the views of others and can add a more realistic, experiential dimension to law studies. Most of the Cases for Students can be used for this purpose.

Role-playing can vary from informal, in-class assignments to formal moot court and mock trial presentations. Section 5 of Part II uses the *Tinker* case to illustrate how judicial decisions can be adapted for mock trials and appeals. In these more elaborate activities, lawyers can play the role of judges, coach a team of student "attorneys," and "debrief" a trial. More informal role-playing activities might be assigned by the teacher the day before your visit. Based on the facts of selected cases in the Guide, students can be assigned the role of an attorney to prepare a three- or four-minute argument on behalf of each side while others can be asked to judge the case and render their opinion.

4. *Other Approaches.* Other methods and materials are illustrated in the excerpts from secondary law publications featured in Part II. Look them over, and try them out.

DO'S AND DON'TS

Here is some advice that law-related educators frequently give to lawyers and law students.

DO

- *Translate "legalese" into English.*
- *Use a variety of methods and examples.*
- *Start where students are, and relate your presentation to their world (e.g.,* with a story involving young people and the law in yesterday's newspaper or on T.V.).
- *At the beginning, briefly tell students about your work and explain the goals of your visit. your visit.*
- *Encourage questions.*
- *Be realistic about the legal system.* (Note its weaknesses as well as its strengths, and show students how they can help improve it.)
- *Let students see you as a real human being.* (Share your interests, concerns, and satisfactions; but don't bore them with the details of your specialty.)

DON'T

- **Lecture at students.**
- **Use legal jargon.**
- **Try to cover a broad range of topics in one class period.**
- **Talk down to students.**
- **Tell a lot of "war stories."**
- **Read a prepared speech.**
- **Let one or two students dominate the discussion.** (If this starts happening, call on other students or limit the number of times one student may speak.)
- **Feel you must defend everything about the operation of the legal system.** (An unrealistic, idealized portrait of the system can increase student cynicism; a thoughtful, balanced presentation should increase understanding.)
- **Give advice on individual legal problems.**

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Part One

Contemporary Legal Issues: Cases for Students and Summaries of the Law for Lawyers and Teachers

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1. The Criminal Justice System

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Hopkins v. State, 193 Md. 489 (1949)
Does ignorance of the law excuse an intentional crime?

B. Is Drug Addiction a Crime?
Robinson v. California, 370 U.S. 660 (1962)
Does a law making addiction a crime violate the Constitution?

C. Prison Conditions
Pugh v. Locke, 406 F. Supp. 318 (1976)
How will courts determine whether the rights of prisoners have been violated?

D. Due Process for Juveniles
In re Gault, 387 U.S. 1 (1967)
Should due process procedures be required in juvenile delinquency hearings?

E. Standard of Proof in Juvenile Proceedings
In the Matter of Samuel Winship, 397 U.S. 358 (1970)
What standard should be used in a juvenile delinquency proceeding in which a child is charged with crime?

Summary of the Law for Lawyers and Teachers

A. Crime and the Criminal Justice System
B. Police
C. Courts
    1. The Criminal Case
    2. Delay and Court Management
    3. Plea Bargaining
    4. Prosecutorial Defense
    5. Rights of the Accused
D. Corrections
E. Juvenile Justice
F. Contemporary Crime-Related Issues: Crime Victims and Drug Use
    1. Crime Victims
    2. Drug Use
G. Conclusion

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1. The Criminal Justice System

Cases for Students

A. CRIMINAL RESPONSIBILITY: *Hopkins v. State (1950)*

NOTES:

Facts

A Maryland statute made it a crime to erect any sign intended to aid in the solicitation or performance of marriages. Maryland authorities had been experiencing problems with profiteering persons seeking to wed out-of-state couples under the liberal Maryland marriage laws.

Reverend Hopkins asked the State's Attorney Office whether a sign he wished to put up outside his home, stating that he could perform marriage ceremonies, might violate the law. He was told that it would not. Thereafter, Reverend Hopkins erected the sign outside his home and another sign along the highway into town. The local prosecutor charged Reverend Hopkins with violation of the Maryland statute, and the trial court convicted him after the judge ruled that the signs were the kind prohibited by law.

Issues for Discussion

1. A famous legal principle is that "ignorance or mistake of the law does not excuse the crime; ignorance or mistake of fact does excuse the crime." What reasons justify this legal principle? What kind of mistake did Reverend Hopkins make?
2. After receiving information from the State's Attorney Office, was Reverend Hopkins still guilty of the crime? Would it be different if he relied on the advice of his own attorney? Would it be different if he relied on his own judgment?
3. Suppose a law made it a crime to remove or dismantle a pollution-control device on an automobile. In repairing your own automobile, you accidentally leave the pollution control device disconnected. Are you guilty of the crime?
4. Suppose under the same law mentioned above, in repairing your own automobile you intentionally disconnect the pollution-control device to increase the mileage from your gas not knowing this act was a crime. Are you guilty of the crime?

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Decision of the Maryland Court of Appeals

Ignorance or mistake of the law will not excuse offenders from criminal responsibility for their actions.

NOTES:

Reasoning of the Court

The court first noted that relying on the wrong advice of an attorney or public official will not excuse an individual from criminal responsibility. The court held that if people were excused of criminal responsibility because they relied on bad advice, then the wrong advice would have the force of law, rather than the law itself.

The court distinguished instances involving an ignorance or mistake of fact from instances involving an ignorance or mistake of law. In the case of the former, individuals not knowing the facts of a situation may not intend to do what they do. However, in the case of the latter, an individual may not know the application of the law, but he or she nonetheless intentionally does what is intended to be done. For example, if a young person gave his sick friend a dangerous drug thinking it was only aspirin, he would not be criminally responsible for his actions because he did not intend to harm his sick friend. But if he intentionally gave a person a dangerous drug without knowing that the drug had been banned, then he would be criminally responsible for his actions because he intended to distribute the dangerous drug. Therefore, while people may be excused for being ignorant of the facts of a situation, they will not be excused for being ignorant of the law they intentionally violated. Thus the Maryland court strictly applied this rule to Reverend Hopkins, and his conviction for violating the statute was upheld. However, many courts will liberally interpret the rule by finding no intent to commit the crime where the defendant was ignorant of the law which made the action a crime.

B. IS DRUG ADDICTION A CRIME? *Robinson v. California (1962)*

NOTES:

Facts

A California law made it a crime punishable by 90 days in prison to be addicted to the use of narcotics. Robinson was detained on the street by a police officer. Upon viewing Robinson's arms, the officer observed what appeared to be numerous needle marks on the left and right arms. The officer said Robinson admitted to the occasional use of narcotics. Robinson was arrested, taken to jail, and later convicted for being an addict.

Issues for Discussion

1. What crime did Robinson commit? Who is the victim of Robinson's crime? Why did the state make this condition a crime?
2. Should Robinson be treated as a criminal or a sick person?
3. Where should Robinson be treated—in a prison, in a hospital, or in a state institution for the mentally ill?
4. Suppose an alcoholic is found drunk in a public place. Should he be charged with a crime? Is there a distinction between alcoholism and drug addition?

Decision of the United States Supreme Court

A state law making the mere status of narcotic addiction a crime punishable by imprisonment is cruel and unusual punishment in violation of the Eighth Amendment.

NOTES:

Reasoning of the Court

Justice Stewart distinguished this case from cases where the state criminally punished a person who uses, purchases, sells, or possesses narcotics. In these instances, Justice Stewart thought a state may have a legitimate interest in criminally punishing such actions. However, the Justice did not believe such an interest existed in this case because the appellant was being criminally punished for merely being addicted to narcotics. Justice Stewart found that since being addicted to narcotics was like being sick, punishing an individual for such an illness constituted cruel and unusual punishment, which is prohibited by the Eighth Amendment.

Justice Clark wrote a dissenting opinion arguing that the California statute was not unconstitutional because the state was attempting to deter and prevent future harmful conduct by a person addicted to narcotics. Justice Clark compared this statute to laws dealing with drunkenness that make it a crime to be intoxicated in public.

C. PRISON CONDITIONS: *Pugh v. Locke* (1976)

Facts

The Alabama Board of Corrections had the responsibility to manage and maintain four penal institutions for males. The four institutions were extremely overcrowded, as evidenced by the data below:

	Maximum Capacity	Actual Capacity
Fountain Correctional Center	632	Over 1100
Holman Unit Prison	540	Over 750
Draper Correctional	632	Over 1000
Kirby Corrections	503	Over 700

The institutions were arranged in dormitory style where bunks were so close that there was no walking space between them. At Kirby, bed mattresses had to be placed on the floor in hallways and next to toilets. Roaches, flies, and mosquitoes infested each facility. There was inadequate heating, ventilation, and lighting at all the institutions. In one housing unit at Draper holding 200 inmates, there was only one working toilet.

The state provided inmates with razor blades and soap; inmates were not provided toothpaste, toothbrushes, shampoo, shaving cream, razors, or combs. Food was stored in dirty storage units and often infested with insects. Sometimes inmates had to share the same eating utensils during meals. A United States public health officer testified that all these facilities were "wholly unfit for human habitation."

Mentally ill or extremely violent inmates were kept in the general population. The general conditions at the institutions made robbery, rape, extortion, theft, and assault an everyday occurrence. Most inmates could not participate in the few vocational, educational, or work activities offered at the institutions. In the disciplinary segregation unit at one institution, six inmates were sometimes packed into a 4′x8′ cell with no beds, no lights, no running water, and a hole in the floor for a toilet.

Admitting that there were many problems at these state institutions, officials of the Alabama Board of Corrections continually explained that they were doing the best they could under the circumstances of inadequate funding and increased commitments of criminal offenders to the system. Inmates filed a class action suit against the State Commissioner of Corrections, claiming that conditions at the institutions constituted cruel and unusual punishment prohibited by the Constitution.

Issues for Discussion

1. What rights or privileges should a criminal offender have while in prison? Is he or she entitled to only "bread and water" or "steak every day?" Is he or she entitled to wear any clothing desired or read any books and magazines desired? Is he or she entitled to have a television or radio in a cell? Should he or she have an opportunity to earn a high-school or college degree?

2. You have just been elected governor of the State of "No-win" on your campaign promise not to raise taxes. After a month in office, a federal judge has ordered that you immediately improve conditions at the state prison. The improvements will cost $10 million and there is *no* extra money in the state budget. Your top political adviser has informed you that any increase in taxes will destroy your political future. What do you do?

3. How would you define cruel and unusual punishment?

4. You are warden at the state prison and you have learned that several inmates have threatened to kill a young inmate for informing guards about an escape plan. The only available space in the prison is the "hole," the disciplinary segregation unit for incorrigible inmates. Inmates in the "hole" have no privileges and traditionally receive bad treatment. How are you going to protect the young inmate?

NOTES:

Decision of the United States Supreme Court

Federal courts have a duty to intervene in the operation of a state prison system characterized by conditions that are so bad as to be shocking to the conscience of civilized people.

Reasoning of the Court

In a far-reaching decision, Judge Johnson held that prisoners are entitled to live in conditions that do not constitute cruel and unusual punishment. The judge said that confinement characterized by conditions that are so bad as to be shocking to the conscience of civilized people is cruel and unusual punishment. The judge found that the living conditions of the inmates bore no relationship to the penal system's legitimate goals of deterrence, rehabilitation, and institutional security. The argument that the state lacked funding to improve conditions in the penal system was rejected on the basis that the state could not rely on inadequate funding in allowing unconstitutional conditions to exist at the institutions.

The most significant part of Judge Johnson's decision was in his order to correct conditions in the Alabama penal system. He established a Citizens' Human Rights Committee to monitor the implementation of specifically ordered improvements in the prison system. He ordered the institutions to reduce overcrowding to a level no higher than the institution's maximum capacity; to provide all inmates with soap, toothpaste, toothbrushes, shampoo, shaving cream, razors, razor blades, and combs; and to develop vocational and educational programs at the institutions.

NOTES:

D. DUE PROCESS FOR JUVENILES: *In re Gault* (1967)

NOTES:

Facts

On June 8, 1964, Gerald Gault, age 15, and another boy were arrested by the county sheriff and taken to the county children's detention home. The boys were accused of making obscene telephone calls to a neighbor, Mrs. Cook. Upon questioning by a probation officer, the boys admitted making the telephone calls.

Gerald's parents were at work the morning he was arrested. The sheriff did not notify the parents that Gerald was being held at the detention home. Later that evening, the parents found out from Gerald's brother that Gerald was being held. When the parents went to the detention home, the probation officer told them why Gerald was there and that he would have a hearing the next day.

The following day the probation officer asked that the juvenile court find Gerald to be a juvenile delinquent and be taken from his parents to be placed in the children's detention home. Arizona law stipulated that a juvenile delinquent was a person under age 18 who:

Has broken the law;
Is continually disobedient and not controlled by his parents, guardians, or custodians;
Is continually absent from school or home; or
Continually behaves in such a way that he harms the morals or health of himself and/or others.

At the afternoon hearing, Gerald, his mother, his brother, two probation officers, and the juvenile court judge were present. Mrs. Cook, the complainant, was not present. No one was sworn in at the hearing and no record was made of the proceedings. At a later hearing, again no one was sworn in and no record was made of the proceedings. Gerald's mother was informed of this hearing by a short note stating the time and date of the hearing. The probation officer gave the judge a report that was not given to Gerald or his parents, and it stated that Gerald made the obscene telephone calls. The judge found Gerald guilty of the offense. An adult found guilty of this crime could be fined $50.00 or imprisoned for two months. The judge ordered Gerald to be placed in the state industrial school as a juvenile delinquent until he was 21 years old unless discharged sooner by the authorities.

Issues for Discussion

1. What constitutional rights guaranteed adults were denied Gerald? Should all these rights be extended to Gerald?

2. If no constitutional rights were extended to Gerald, how would his hearing be affected?

3. What possible conflicts could arise between a law extending all constitutional rights to juveniles and a law that only considers the "child's best interest?"

4. Should juvenile offenders be treated the same as adult offenders? Same penalties? Same prisons?

Decision of the United States Supreme Court

In a juvenile delinquency proceeding which may result in the child's commitment to an institution, due process of law requires that the child be guaranteed the following rights that are guaranteed an adult in a criminal proceeding: the right to be notified of charges against him, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses against him.

NOTES:

Reasoning of the Court

Justice Fortas wrote the majority opinion beginning with a discussion of the wide gap between the theory and realities of the juvenile justice system. He noted that while the theory of the juvenile justice system placed great emphasis on the child's best interest and the informality of procedures, the reality of the system often tended toward arbitrary procedures that lacked the constitutional safeguards guaranteed an adult criminal defendant. The Justice stated that the state's authority to intercede on behalf of the delinquent child's best interest should not be unlimited. Declaring that due process of law was the very foundation of individual freedom from unfairness and arbitrariness, Justice Fortas held that certain constitutional rights must be extended to juveniles because a finding of delinquency could result in the confinement of the juvenile, just as a criminal conviction could result in the confinement of an adult. The right to be notified of charges was required so that the juvenile could prepare his case against the charges. The right to counsel would assure the juvenile a trained legal advocate during the delinquency proceedings. The privilege against self-incrimination was essential to insure the integrity of delinquency proceedings against unfair compulsion in seeking confessions. The right to confront and cross-examine witnesses was required based on the principle of fairness in allowing an individual to confront and question his accusers.

Justice Stewart rejected the majority's argument analogizing juvenile delinquency proceedings to criminal trials. Discounting the similarity between a delinquency proceeding and criminal case, Justice Stewart stated that the purpose of the juvenile proceeding was to aid juveniles in correcting their delinquency. This, he argued, was very different from a criminal trial where the purpose was determining whether the accused is guilty of a crime.

E. STANDARD OF PROOF IN JUVENILE PROCEEDINGS: *In the Matter of Samuel Winship* (1970)

NOTES:

Facts

Samuel Winship, age 12, was accused of stealing $112.00 from a woman's purse. In a juvenile court hearing, after the evidence was presented, the judge ruled that there was more evidence to prove that Samuel had stolen the money than there was to show that he had not. Therefore, the judge held that this was "sufficient proof by a preponderance of the evidence" to show that Samuel was a delinquent child.

The judge believed that proof beyond a reasonable doubt necessary for an adult criminal conviction was not necessary in juvenile proceedings. Although he believed that Samuel's delinquency had not been proven beyond a reasonable doubt, he ruled that proof by this standard was not necessary because Samuel was in a juvenile proceeding and not in a criminal court. Thus, Samuel was found to be delinquent and placed in the custody of the state juvenile detention institution. Under New York law, Samuel could be kept in the institution until he was 18.

Issues for Discussion

1. In a criminal case, the defendant can only be found guilty by proof beyond a reasonable doubt. Why should this standard of proof be required? Are there reasons for a lesser standard of proof in juvenile proceedings?
2. Is there any difference between being found guilty of a crime and sentenced to prison, and being adjudged a delinquent child and sent to the state juvenile institution for rehabilitation?

Decision of the United States Supreme Court

In a juvenile delinquency proceeding in which a child is charged with an act that would be a crime if committed by an *adult, the charge against the child must be proved beyond a* reasonable doubt.

NOTES:

Reasoning of the Court

The law recognizes two standards of proof in general—in criminal proceedings, proof beyond a reasonable doubt and in civil proceedings, proof by a preponderance of evidence. Proof beyond a reasonable doubt has been recognized as the higher standard of proof and, therefore, is applicable in criminal cases because the liberty of the accused is at stake. This proposition recognizes the fact that the consequences of a criminal proceeding—loss of liberty or even loss of life—are more severe than the consequences in a civil proceeding—money damages, etc. Writing for the majority, Justice Brennan noted that the purpose of the reasonable doubt standard in criminal cases was to insure the certainty of a finding of guilt and reduce the risk of conviction based on factual errors. Therefore, the judge or jury had to be convinced by proof beyond a reasonable doubt that the accused is guilty of the crime charged.

Justice Brennan relied on the reasoning in the *Gault* decision to hold that the reasonable doubt standard must be used in a juvenile delinquency proceeding to protect the innocent juvenile just as it is used in a criminal case to protect the innocent adult. Use of the lower preponderance of evidence standard would allow a finding of delinquency based upon a weighing of the evidence to determine whether more evidence weighed against the juvenile's case than in favor of his case.

Chief Justice Burger wrote a dissenting opinion arguing that the Court continued to erase the important distinction between the juvenile justice system and the criminal justice system. The Chief Justice argued that this erosion would do more harm to the juvenile justice system than good by adding rigid formality to an already inflexible system.

Summary of the Law for Lawyers and Teachers

A. CRIME AND THE CRIMINAL JUSTICE SYSTEM

This section examines the major responsibilities and current problems within the criminal justice system. (In the next section on CRIMINAL PROCEDURE, the focus is on the procedural and substantive issues in criminal law.) The primary components of the criminal justice system are the police, the courts, and the corrections system. The juvenile justice system will be included in this discussion because of its many similarities to the criminal justice system.

An examination of the criminal justice system should first view the problem of crime in the United States. Recent statistics indicate that crime is increasing. According to the Federal Bureau of Investigation (F.B.I.),

> An estimated 12,152,730 Crime Index offenses [murder, forcible rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft], 9 percent more than during 1978, were reported to law enforcement agencies in 1979. Collectively, violent crimes, which comprised 10 percent of the total Crime Index, were up 11 percent and property crimes rose 9 percent.
>
> All offenses within the Index increased in volume during the year. Among the violent crimes, murder was up 10 percent; forcible rape, 13 percent; robbery, 12 percent; and aggravated assault, 10 percent. In the property crime category, burglary increased 6 percent, larceny-theft rose 10 percent, and motor vehicle theft was up 11 percent. *F.B.I. Uniform Crime Reports, Crime in the U.S. 1979* (1980) p. 37.

What can be done about this problem? The police are responsible for apprehending criminals. The courts function as forums to determine the guilt or innocence of those accused of crimes. Correctional institutions serve as centers to confine, and, hopefully, rehabilitate those convicted of crimes. Correctly or not, American society has relied on these system components to manage the crime problem. How do these components function? What are the current problems facing them? How can they operate more efficiently?

B. POLICE

Modern society demands a tremendous number of services from police systems, including the following functions:

- Prevention of criminal activity
- Detection of criminal activity
- Apprehension of criminal offenders
- Participation in court proceedings
- Protection of Constitutional guarantees
- Assistance to those who cannot care for themselves or who are in danger of physical harm
- Control of traffic
- Resolution of day-to-day conflicts among family, friends, and neighbors
- Creation and maintenance of a feeling of security in the community
- Promotion and preservation of civil order

A National Strategy to Reduce Crime, National Advisory Commission on Criminal Justice Standards and Goals, (1973) p. 72.

Combining this burdensome demand with the growing problem of crime in society, police systems in the United States have been taxed to the limit of their capacity to handle both the traditional tasks of law enforcement (*i.e.*, civil order and law enforcement), and the more complex but emerging role as general social servants. In a comprehensive review of the police function in the United States, the President's Commission on Law Enforcement and Administration of Justice asserted,

> The current widespread concern with crime and violence, particularly in large cities, commands a rethinking of the function of the police in American society. It calls for a reassessment of the kinds of resources and support that the police need to respond more adequately to the demands that we make upon them. *Task Force Report: The Police*, The President's Commission on Law Enforcement and Administration of Justice (1967) p. 13.

Such a wide-ranging, national assessment was accomplished in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals. Its major recommendations concerning the police function concentrated on current problems facing modern police systems.

One major recommendation was aimed at improving the relationship between the police and the community, especially the black, Chicano, and Puerto Rican residents of large, urban communities. The Commission recommended that the police promote active crime prevention efforts by working with the community in a joint venture against criminal activity. Another recommendation called for the diversion of juveniles, drunks, and mental patients from the criminal justice system to social agencies and facilities more suited to the needs of these individuals. It was felt that treatment and care for these individuals would be better served by specialized agencies skilled in dealing with the particularized problems of delinquency, alcoholism, and mental illness, thus relieving the police of such responsibilities. This emerging concept of diversion from the criminal justice system continues to be a goal that knowledgeable experts advocate. The Commission also recommended the consolidation or elimination of police systems with fewer than ten full-time officers. It was believed that small police agencies lacked the resources to efficiently provide law enforcement services to their communities; thus, consolidation of such agencies with nearby police systems could maximize the utilization of both human and material resources while minimizing the costs. Relying upon supportive evidence that police officers with college degrees performed better than those without, the Commission recommended completion of college education as a qualification for police service. Other recommendations strongly urged more police training. The Commission noted, "The average barber receives 4,000 hours of training. The average policeman receives less than 200 hours." *A National Strategy to Reduce Crime, supra,* p. 83.

As initiators of the criminal justice process, the police must operate effectively so that other components of the system can function properly. The prosecution and judicial functions are severely handicapped if the police ineffectively perform the duties of apprehension and evidence gathering.

C. COURT

In the criminal justice system, the court system has three general functions. First is the speedy determination of the guilt or innocence of individuals who are charged with criminal offenses. Another function is the sentencing of those individuals convicted of crimes. The third is the protection of the rights of the offender.

The popular perception is that the court is at the center of the criminal justice system wherein the inte[illegible]iety and those of the offender are dispassiona[illegible] balanced. However, this perception of the courts is modified by the reality of overcrowded court dockets and insufficient court resources. As Dean Nicholas Kittrie of The American University Law School noted, it is a "gross exaggeration" to say that courts are "the pivot on which the criminal justice system turns." The criminal courts in America are not in the mainstream of criminal justice and are not central to the gross operation of the system of crime and punishment. At best, the courts offer an opportunity for the stylized enactment of selected performances, which alternate between morality plays and modern versions of trial by ordeal. These dramatic enactments affect a relatively small segment of the criminal justice population. But much like theater and cinema, they are observed directly or through mass-media reporting by large segments of the population, and consequently they affect the public consciousness. It is in this function that the courts stand out for their role as symbols of justice. *An Anatomy of Criminal Justice* (C.H. Foust & D.R. Webster, eds., 1980) p. 121.

This observation is buttressed by the National Advisory Commission estimate that only about eight percent of those arrested are fully processed through criminal prosecution and trial. Nonetheless, it is important to remember that the judiciary is the ultimate determiner of rights and responsibilities that extend beyond the criminal trial itself (*e.g.*, prohibition against unreasonable searches and seizures, pretrial right to counsel, and prohibition against cruel and unusual punishment). Although the symbolic significance of justice rather than its reality may be exaggerated in the popular perception, many symbolic ideals are the very foundation of a constitutional democracy.

1. The Criminal Case: From Arrest to Appeal

The first contact an accused has with the criminal justice system is usually an *arrest* by a police officer. The arrest of the accused can be made without a warrant if the police officer has a sufficient basis to believe that a crime has been, is being, or is about to be committed by the accused. An arrest can also be made pursuant to a warrant where a judicial officer has been given adequate evidence against the accused to form a sufficient basis for the arrest. This sufficient basis for an arrest is known as "probable cause," which means that the officer knows of facts and circumstances that reasonably justify him in believing that a crime has been, is being, or is about to be committed. Within a short period of time after the arrest, the accused must have an *initial hearing* before a judge. The purpose of the hearing is to (a) inform the accused of the charges against him, (b) inform him of his rights, (c) appoint counsel for the accused if needed, and (d) set bail or assure appearance of the accused in court at a later time. At this hearing the accused is given an opportunity to challenge both the sufficiency of reason to arrest (if without warrant) and the sufficiency of reason to charge him with a crime. Thus a judicial determination of the sufficiency of probable cause is made once again. The accused is then formally charged in a document known as an *information* filed by the prosecuting attorney in the court where the accused is to be formally tried. If the accused is formally charged by a grand jury, the document is known as an *indictment*. Next, the accused is asked to enter his plea to the court which will try him at an *arraignment*. Generally, he may plead guilty or not guilty. If he pleads guilty, the judge must be sure he understands the charges against him and that there is some reasonable factual basis for the guilty plea. If he pleads not guilty or makes no plea at all, a formal *trial* will be set for a later date. The prosecution must prove during the trial that the accused is guilty of the crime charged beyond a reasonable doubt. At the trial, *selection of a jury* will be the first order of business, unless jury trial has been waived by the accused. The prosecution presents its case *(opening statement and evidence)* first, and then the defense presents its case on behalf of the accused. After the evidence has been presented, *final arguments* are made to the jury by the prosecution and the defense. *Instructions* regarding the applicable law are given to the jury and the jury retires for its *deliberations*. Usually, the jury may return a *verdict of guilty, not guilty,* or *not guilty by reason of insanity* where the insanity defense has been raised. If the accused is found guilty, the judge will impose *sentencing* at a later hearing. Once convicted, the defendant may *appeal* his case to an appellate court for a review of the alleged errors in the trial proceedings.

2. Delay and Court Management

A continuing problem plaguing the criminal judiciary is the heavy case dockets burdening both trial and appellate courts. Many feel the best method to solve this problem is to employ advanced management techniques. As the problem becomes more critical, some commentators have proposed substantive system changes to shorten the lengthy process from arrest to trial.

The consequences of the problem of delay are noted by the National Advisory Commission, "Delay in the judicial process is harmful to both the accused offender and society at large. Delay also results in unavailable witnesses, forgotten circumstances, and dismissal of prosecutions because the defendant did not receive the speedy trial guaranteed by the Constitution." *A National Strategy to Reduce Crime, supra,* p. 93. The Commission estimated that it may take from ten to twelve months to process the accused from arrest to trial. Delay in criminal litigation also results in minimizing any deterrent effect to be derived from apprehension and punishment of the criminal offender, since lengthy delays weaken the obvious connection between the crime and its punishment.

To reduce delay, one recommended approach is that each state unify all its trial courts under the administrative authority of the state's highest court and establish a state court administrative unit with responsibility over the entire state court system.

3. Plea Bargaining

A controversial issue in the criminal justice field is plea bargaining. It has been estimated that more than 90 percent of all criminal convictions are obtained through a plea of guilty rather than a jury verdict or court judgment. Plea bargaining is a process of negotiation in which the defense and prosecution try to secure the best arrangement possible as to the number or type of charges or type of sentence.

Prosecutors have relied on plea bargaining to reduce their criminal case backlog. Many observers have concluded that plea bargaining is necessary and desirable. Some criminal justice experts believe that the system could not operate without plea bargaining, considering the current heavy criminal caseload. Also, it is argued that plea bargaining increases the flexibility within the otherwise rigid legalisms of the criminal justice system.

However, many commentators believe that the need to have speedy trials and the lack of prosecutorial resources do not justify plea bargaining. Critics also believe the curtailment of plea bargaining would lead to a reduction in the prosecutorial practice of overcharging. Only those criminal charges that would reasonably result in conviction would be filed against the accused. To counter the argument that plea bargaining adds flexibility to the system, critics state that such flexibility should be incorporated in the substantive criminal law. The National Advisory Commission recommended the abolition of plea bargaining, labelling the practice "inherently undesirable." The Commission recommended that all plea bargaining be gradually discontinued over a five-year period. *Report on Courts*, National Advisory Commission on Criminal Justice Standards and Goals, p. 46.

Over the years, the courts have imposed certain requirements before a plea of guilty can be accepted by a court. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court held that before a court may accept a guilty plea, the court record must establish that the defendant voluntarily and intelligently waived his right to trial by jury, his right of confrontation, and his privilege against self-incrimination. The guilty plea must also be made understandingly, meaning that the defendant must know the charges against him and the effect of a guilty plea. In *Brady v. United States*, 397 U.S. 742 (1970), the Court noted the importance of plea bargaining in disposing criminal cases, its aid in the rehabilitative process regarding the defendant's acknowledgement of guilt, and its allowance of participation by the defendant in determining the measure of punishment. However, in *Borden-Kircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court held that a threat to prosecute the defendant's wife as a co-defendant if the defendant failed to accept a plea bargain was so coercive as to make the defendant's plea of guilty involuntary and thus unconstitutional.

4. Prosecution/Defense

An important actor in the American criminal justice system is the prosecutor. The National Advisory Commission stated, "It is the prosecutor who must focus the power of the State on those who defy its prohibition. He must argue to the bench and jury that the sanctions of the law need to be applied. He must meet the highest standard of proof because the right of freedom hangs in the balance." *Report on Courts, supra*, p. 227. It is important to recognize that the ultimate duty of the prosecution is at all times to seek justice and not convictions for criminal offenses. In seeing that justice is done, the prosecution function is that of a public officer and not a zealous advocate.

Local prosecutors are usually elected public officials. It is their duty to see that the laws of the jurisdiction are faithfully executed and enforced. The power to file criminal charges against an accused is the prosecution's broadest power. The prosecution also conducts most of the criminal litigation on behalf of the state. A major duty of the prosecution is the negotiation of plea bargains. The lack of resources and the use of outdated managerial practices are serious problems facing many public prosecutors.

Considering the adversary system of justice in the United States, no other role is more important than that of the criminal defense counsel. The American Bar Association Project on Standards for Criminal Justice described the defense counsel as,

> . . . [c]hampion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried. Of course, as a practical matter he does this not by formally educating the client on every legal aspect of the case, but by taking those procedural steps and recommending those courses of action which the client were he an experienced advocate himself, might fairly and properly take. . . . Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct. . . . The second role of counsel is as intermediary. . . . As intermediary counsel expresses to the court objectively, in measured words and forceful tone, what a particular defendant may be incapable of expressing himself simply because he lacks the education and training.
> *The Prosecution Function and the Defense Function*, American Bar Association Standards Relating to the Administration of Criminal Justice, 1971, p. 145.

Therefore, the criminal defense counsel serves as an advocate to legally articulate the interests of his client accused of criminal conduct. This articulation embodies the issues of innocence and guilt, the existence of mitigating factors, the negotiations on the client's behalf, and the general protection of the accused's rights.

A continuing problem in the criminal justice system is the adequacy of criminal defense services to the poor. All United States jurisdictions have a public defender system by which criminal defense services are provided at public expense to criminal defendants unable to pay for such services. It is estimated that approximately 60 percent of the felony defendants and 25 to 50 percent of the misdemeanor defendants require such services. Although in many instances such services are constitutionally required, many states experience difficulty in economically and efficiently providing these services. As in the case of prosecutorial operations, many states are moving toward the provision of more resources to improve the functioning of public defenders.

5. Rights of the Accused

To insure that only the guilty individual is punished for the commission of a criminal offense, important rights have been guaranteed one accused of committing a crime. Certain fundamental rights have been enshrined in the Constitution to assure the accused a fair proceeding and to protect the integrity of the criminal justice process. One of the most important rights guaranteed the accused in a criminal case is the *right to counsel.* In *Argensinger v. Hamlin,* 407 U.S. 25 (1972), the Supreme Court held that the accused must have the right to counsel in all criminal cases where the crime charged is a felony or, if upon conviction, actual imprisonment is imposed. In *Kirby v. Illinois,* 406 U.S. 682 (1972), the Court went further, holding that once criminal charges have been filed against an accused, he is entitled to counsel at all critical stages of the criminal proceedings. Such critical stages of the criminal proceedings are a preliminary hearing to determine probable cause, *Coleman v. Alabama,* 399 U.S. 1 (1970); post-indictment police lineup, *United States v. Wade,* 388 U.S. 218 (1967); and entry or plea of guilty, *Moore v. Michigan,* 355 U.S. 155 (1957). The right to counsel includes the right to appointment of counsel by the court for an indigent defendant. *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The accused has a right to *trial by jury* in all criminal cases involving a serious charge against the accused. *Duncan v. Louisiana,* 391 U.S. 145 (1968). Where the criminal offense has a potential sentence of more than six months, it is a serious offense. *Baldwin v. New York,* 399 U.S. 66 (1970).

An accused cannot be compelled to give testimony which could be used against him in a criminal proceeding. This right is commonly known as the privilege against *self-incrimination.* In a criminal trial, the prosecution cannot make any direct comment on the accused's failure to testify. *Griffin v. California,* 380 U.S. 609 (1965).

The accused has a *right to confront* all witnesses against him. This right entitles the defendant to be present when testimony is offered against him and to cross-examine all witnesses testifying against him.

The accused has a *right to a speedy trial.* This right is essential to protect the interests of the accused against oppressive confinement before trial and the interests of society in the prompt administration of justice. *Barker v. Wingo,* 407 U.S. 514 (1972). The right becomes effective upon arrest or formal charging by indictment or information.

Even though the present operation of the criminal justice process allows many criminal cases to be diverted from the criminal courts, it would be a misconception to underestimate the influence of the courts in the criminal justice system. In short, efficient operation of the judiciary is paramount to safeguarding the integrity of the criminal justice process.

D. CORRECTIONS

After arrest and conviction, what is to be done with the criminal offender? Many theories and methodologies have been advanced to justify or explain how societies deal with their criminal offenders. Most observers agree that these theories or methodologies include one or more of the following factors:

Punishment	—	penalizing for past wrongful acts
Rehabilitation	—	correcting wrongful conduct for prospective reentry into society
Deterrence	—	preventive and punitive measures to impede future wrongful conduct by this wrongdoer and by others
Incapacitation	—	removal from society to prevent further wrongful conduct

Up to the eighteenth century, retributive punishment was the essential direction of corrections in most of the world. Broadly defined criminal conduct was severely and harshly punished on the basis of "an eye for an eye" or community vengeance for wrongful conduct. Such gruesome forms of punishment as burning at the stake, drawing and quartering, and mutilation were earned for the pettiest offense. Thereafter, more humane correctional practices slowly came about, based upon the advocacy of such notable social philosophers as Ceasare Beccaria and Jeremy Bentham. By the middle of the nineteenth century, the penitentiary system of corrections became the widespread practice.

In modified form, most corrections systems today predominantly rely on the penitentiary as the major method of corrections. In this system, large, fortress-like institutions house numerous criminal offenders in United States federal and state prisons. Annual Prison Population Survey, *Corrections Magazine,* April 1981, p. 25. The latest figures indicate that in 1978 federal and state governments spent $5,522,711,000 in the corrections area. *Sourcebook of Criminal Justice Statistics* - 1980, p. 5. As a major component of the criminal justice system, correctional systems in the United States have been overwhelmed by a vast number of problems. Many commentators are beginning to label our corrections system a "failure" calling for a total overhaul of the system. Such distinguished organizations as the National Council on Crime and Delinquency have called for a moratorium on new prison construction. A partial listing of the critical problems in corrections would include overcrowded prisons, dilapidated facilities, inadequate resources, and the financially prohibitive cost of renovation. Some would argue that current practices and methodologies utilized in corrections are archaic and directionless. The National Advisory Commission gave this summation,

> The American correctional system today appears to offer minimum protection for the public and maximum harm to the offender. The system is plainly in need of substantial and rapid change.
>
> Figures on recidivism make it clear that society today is not protected—at least not for very long—by incarcerating offenders, for many offenders return to crime shortly after release from prison. Indeed, there is evidence that the longer a man is incarcerated, the smaller is the chance that he will lead a law-abiding life on release. . . .
>
> It also seems clear that many persons can serve their sentences in the community without undue danger to the public.
>
> There is substantial evidence that probation, fines, public service requirements, and restitution are less costly than incarceration and consistently produce lower rates of recidivism after completion of sentence. *A National Strategy to Reduce Crime, Supra,* p. 113.

More and more, new approaches in corrections are being considered involving alternatives to the traditional form of incarceration. Many advocates of new approaches in corrections believe that community correctional treatment is more effective than the present prison system. Community corrections usually involves a less institutionalized structure of corrections within the urban community where emphasis is placed on the reintegration of the offender in the community. Others advocate diversion of many offenders from the traditional corrections system of incarceration to a wider variety of correctional programs such as probation, public service, work and/or education release, and small-group residential treatment.

Current estimates are that it costs about $10,000 to $20,000 per year to incarcerate an inmate in prison, and the cost for building more prisons is about $40,000 to $60,000 per new cell. Given these cost considerations and the questionable effectiveness of the traditional prison system in the United States, the future trend in corrections will probably involve a greater reliance on the new approaches.

E. JUVENILE JUSTICE

Recent statistics revealed that of all persons arrested in the United States, 23 percent were under age 18. *F.B.I. Uniform Crime Reports, supra,* p. 186. The problem of youth crime in the nation is both serious and growing. Youths involved in criminal activity usually come into contact with the juvenile justice system, which basically consists of a specialized court and dispositional system to deal with juveniles. Most state laws define a juvenile subject to the jurisdiction of the juvenile courts as a youth under age 18. Juvenile delinquency is usually defined as an act committed by a juvenile that would be a crime if committed by an adult. Depending on the state definition, other acts such as truancy, running away, and incorrigibility may constitute delinquency. Also, in juvenile law there are the less formal juvenile adjudications rather than criminal trials for adults.

Before the twentieth century, juveniles in many instances were subject to the same legal processes as adults. Juveniles were housed in the same detention houses, jails, and prisons as were adults. During the nineteenth century, however, many reformers in the United States borrowed a concept from old English law to institute changes in the American practices concerning juveniles and the law. This concept known as *parens patriae* loosely involved a doctrine proclaiming that the child was subject to the protective custody of the state, and, therefore, when the child was "wayward" with respect to the law, the state was obliged to step in for the benefit of the child. The state then would guide the youth in accordance with the "child's best interest." This doctrine led to the development of specialized juvenile courts and dispositional systems for youths as the twentieth century began.

Discounting the good intentions of this system and looking to its impact on the rights of juveniles over the years, the United States Supreme Court made a comprehensive examination of the juvenile justice system in two important cases, *Kent v. United States,* 383 U.S. 541 (1966) and *In re Gault,* 387 U.S. 1 (1967) (included in the Cases for Students section). In *Kent,* the Court addressed issues involving the waiver of a juvenile to the jurisdiction of a criminal court. In the juvenile justice area, waiver of jurisdiction means that a youth accused of committing certain serious criminal offenses that would be crimes if committed by an adult will be tried as an adult in a criminal court even though the age of the youth was that of a juvenile. The Court held that before such a youth could be waived to the jurisdiction of the criminal court, the youth was entitled to an opportunity for a hearing, the right to counsel, and access to his court records on the grounds of due process. *Kent* set in motion the Court's critical examination of the *parens patriae* doctrine. The following year, the Court issued its culminating decision in *Gault,* injecting due process protection in juvenile delinquency adjudications. The Court pierced the veil of the well-meaning *parens patriae* doctrine, noting that, although the state claimed to be stepping in for the "child's best interest," such actions many times resulted in arbitrary and unfair judgments toward the juvenile lacking the fundamental requirements of due process. The Court concluded that when a juvenile delinquency adjudication could result in the juvenile's confinement, due process required that the juvenile has the right to counsel, the right to notice of charges, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.

Later in *In re Winship,* 397 U.S. 358 (1970) (included in the Cases for Students section), the Court followed *Gault,* holding that in cases of delinquency adjudication, the determination of delinquency must be proven beyond a reasonable doubt. Such a standard of proof is required for a finding of guilt in a criminal case. The Court in *Winship* held that this same standard applied in a delinquency adjudication because the juvenile was subject to a deprivation of liberty.

However, the Court limited the application of the *Gault* rationale in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971). In *McKeiver,* the Court held that the due process fundamental fairness requirement did not extend the right to trial by jury to juvenile adjudications. The Court found that the right to trial by jury was not essential for fundamental fairness in juvenile adjudications. The Court reasoned that such a right might destroy any effort to informalize juvenile proceedings, thus making the proceedings as rigidly formalistic as criminal trials.

These cases indicate the delicate balancing that must be accomplished in resolving problems within the juvenile justice system. With the rise in youth crime, this balancing process will remain delicate as the juvenile justice system continues to wrestle with youth crime while keeping in mind the "child's best interest."

F. CONTEMPORARY CRIME-RELATED ISSUES: CRIME VICTIMS AND DRUG USE

1. Crime Victims

Only recently has the criminal justice system begun to respond to the plight of victims of crime. Recent estimates are that in 1978 there were close to 23 million incidents involving personal crime victimization (victimization involving rape, robbery, assault, or personal larceny) and over 17 million incidents involving household crime victimization (victimization involving burglary, larceny, or vehicle theft). *Sourcebook of Criminal Justice Statistics - 1980,* p. 228. Victims of crime suffer numerous injuries including physical and psychological harm, loss of personal security, and property loss. Until recent years, the criminal justice system contained few mechanisms to address the problems of crime victims. Ordinarily, a crime victim could spur the prosecution of the perpetrator, but this did not rectify the harm to the victim.

Today, a widespread concern is being voiced to assist crime victims. One concept being implemented in many localities is the establishment of crime victim programs in police systems, prosecutor offices, or separate government agencies. Crime victim programs have been established to assist crime victims during their period of crisis, to counsel crime victims, and to provide for the immediate need of crime victims after the crime has occurred.

Another concept is crime victim compensation legislation. Victim compensation legislation is usually designed to provide financial compensation to victims of violent crime for the physical injuries suffered as a result of the crime. Legislation to compensate the victim of violent crime has been enacted in more than one-half of the states.

2. Drug Use

Although social attitudes about drug use have changed dramatically in the last 20 years, the nonmedical use of drugs is still generally prohibited by criminal laws. In 1979, there were over 500,000 persons arrested in the U.S. for drug abuse violations. *F.B.I. Uniform Crime Reports, supra,* p. 188. However, the recent trend has been to severely punish drug dealers but reduce criminal sanctions against drug users. Especially in the case of possession of small amounts of marijuana, the trend has been to lessen criminal penalties for such crimes. Some have advocated decriminalizing the use of marijuana altogether arguing that the criminal justice system is not the appropriate framework to deal with such drug users.

Some flexibility has entered the law regarding treatment of the user of dangerous drugs. This trend was reflected in the Supreme Court's decision in *Robinson v. California,* 370 U.S. 660 (1962) (included in the Cases for Students section), where the Court held that a person could not be imprisoned merely because he was addicted to narcotics. The modern practice has been toward diverting drug users from the criminal justice system to programs specially designed to treat drug abuse. Such programs are now in effect in almost all major localities.

G. CONCLUSION

There is a great need for improvement in the criminal justice system. The functions of the police and the courts may be in need of thoughtful revision to tailor them to the demands of modern society. The correction system and juvenile justice system are in need of major repair as the gap between the goals of the systems and the current practices in the systems widen. Many legal and societal issues will involve a discussion of these improvements in the future.

2. Criminal Procedure—Search and Seizure, Confessions, Identifications, Electronic Surveillance, and Entrapment

Cases for Students

A. Searches When Arrested
Chimel v. California, 395 U.S. 752 (1969)
What is the scope of a search incident to a lawful arrest?

B. The Exclusionary Rule
Mapp v. Ohio, 367 U.S. 643 (1961)
Can illegally seized evidence be used in criminal proceedings?

C. The Warning of Rights and Confessions
Miranda v. Arizona, 384 U.S. 436 (1966)
How is the suspect's privilege against self-incrimination to be protected during police interrogations?

D. Electronic Surveillance
United States v. White, 401 U.S. 745 (1971)
May government agents or informers use concealed electronic devices to record conversations with a criminal suspect without a search warrant?

E. School Searches
People v. Scott D., 34 N.Y. 2d 483 (1974)
What is the basis for determining the legality of a search and seizure in a public school?

Summary of the Law for Lawyers and Teachers

A. Introduction
B. Search and Seizure
  1. The Fourth Amendment Protection
  2. Searches Pursuant to a Warrant: The Probable Cause Requirement
  3. Searches Without a Warrant
    a. Searches Incident to Arrest
    b. Automobile Searches
    c. Consent Searches
    d. Other Exceptions
    e. Stop and Frisk
  4. The Exclusionary Rule
  5. Search and Seizure and Young People
C. Confessions
  1. Voluntariness
  2. Warnings
  3. Unnecessary Delay
D. Identifications
E. Electronic Surveillance and Entrapment
F. Conclusion

2. Criminal Procedure

Cases for Students

A. SEARCHES WHEN ARRESTED: *Chimel v. California (1969)*

NOTES:

Facts

Three police officers went to Chimel's house to serve him with an arrest warrant. The officers intended to arrest Chimel on the suspicion that he was involved in the burglary of a coin shop. Upon their arrival at Chimel's home, the officers knocked on the door, identified themselves, and asked if they could come in. Chimel's wife let them in and later when Chimel arrived, the officers arrested him. The officers did not have a search warrant but asked Chimel if they could look around. Chimel refused. Nevertheless, the officers said that they were going to conduct a search pursuant to the arrest and proceeded to search the entire house, seizing many objects, including some coins they suspected were from the burglary. Chimel was convicted of the burglary based on the introduction of the coins as evidence at his trial, and he appealed to the United States Supreme Court.

Issues for Discussion

1. After Chimel was arrested, should the police have been allowed to search the entire house without a warrant? Why?
2. After Chimel was arrested, should the police have been allowed to search his person? The room where he was arrested? His bedroom?
3. In what situations should police be required to obtain a warrant for a search? Should police be required to obtain a search warrant in all situations?
4. Suppose your neighbor said, "All the young people in this neighborhood are on drugs. If all parents would allow the police to search their child's room for illegal drugs, I bet we would get rid of this drug problem." Would there be any problems with this type of search?

Decision of the United States Supreme Court

A search pursuant to a lawful arrest is limited to the area in which the arrested person might reach to grab a weapon or to destroy evidence.

Reasoning of the Court

The Fourth Amendment prohibits "unreasonable searches and seizures" by government agents. Thus, a standard of reasonableness is used to determine the legality of searches. Here, since the arrest was lawful, the Supreme Court found that it was reasonable for the arresting officers to search the arrested person in order to remove any weapons that the person might use to escape or to harm the officers. Furthermore, the Court found it reasonable for the officers to search for and seize any evidence on the arrested person in order to prevent concealment or destruction of the evidence. Therefore, a search of the arrested person and the "area of immediate control" was justified.

However, the Court could find no justification for the warrantless search of the entire house. In the Court's interpretation of the Fourth Amendment, police officers are required to obtain a search warrant from a court before conducting the search unless some special circumstance justifies a warrantless search. One such special circumstance existed in this case where the search was conducted pursuant to a lawful arrest. But in this case, the Court found that no special circumstances existed concerning the search of the entire house. Therefore, the Court held that such a search should have been limited to the room where the arrest occurred. Otherwise, a warrant should have been obtained in order to search the entire house.

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B. THE EXCLUSIONARY RULE: *Mapp v. Ohio (1961)*

NOTES:

Facts

Three police officers went to the home of Ms. Mapp after receiving information that a person was hiding there who may have been involved in a recent bombing. The officers also had information that papers connected with a gambling operation were at the house. Upon arrival at Mapp's home, the officers knocked and demanded entry. Ms. Mapp immediately called her attorney and refused to admit the officers without a search warrant.

Three hours later, the officers returned with other police officers. When Mapp did not come to the door this time, the officers forcibly opened the door. After the officers entered the house, Mapp demanded to see a search warrant. An officer claimed he had a search warrant and flashed a piece of paper before Mapp. She grabbed at the paper and a struggle ensued. The officers handcuffed Mapp and took her upstairs. Then the officers began searching the entire house. In the basement of the house, the officers found a trunk containing some obscene books and pictures. Mapp was arrested for possession of the materials and was convicted of the charged crime. At trial, there was no evidence that the officers ever had a search warrant.

Issues for Discussion

1. Did the police officers have time to get a search warrant from a judge in order to conduct the search of Ms. Mapp's home?
2. Was the search of Ms. Mapp's home a reasonable or unreasonable search? Why?
3. Suppose you are a judge in a criminal trial and it appears that the police officers who investigated the case made an illegal search to get evidence against the defendant. What would you do? Allow this evidence to be used against the defendant? Lecture the police during or after the trial to prevent such practices in the future? Talk to the police officers' superiors about preventing such practices in the future?
4. Suppose a bank robber shot and killed a bank guard during a robbery. Later, the police found the gun used for the killing by illegally searching the bank robber's purse. Her fingerprints on the gun are the only evidence to connect her to the killing. Would you ignore the illegal search and convict the robber on the charge of murder? What would you do concerning the illegality of the search?

Decision of the United States Supreme Court

NOTES:

Evidence concerning a crime which is obtained in violation of the Fourth Amendment cannot be admitted at a state criminal trial.

Reasoning of the Court

In *Weeks v. United States* (1914), the Supreme Court held that evidence obtained in violation of the Fourth Amendment could not be admitted at a *federal* criminal trial. However, in *Wolfe v. Colorado* (1949), the Court said this rule did *not* apply to *state* criminal proceedings because the concept of due process of law in the Fourteenth Amendment did not require that states adopt such a rule.

In this case, the Court concluded that there was no justification for this inconsistency. The inconsistency prevented a federal prosecutor from using illegally seized evidence, yet allowed a state prosecutor to use such evidence. The Court stated that the purpose of this exclusionary rule—that no evidence obtained by police through an unreasonable search and seizure could be admitted at trial—was to deter illegal search and seizure practices by law enforcement officers by removing the incentive to resort to such practices. Therefore, if police obtained evidence illegally, it could not be used in criminal prosecutions. The Court noted that since the exclusionary rule was designed to protect the citizen's right to privacy, it should be equally applicable to the states as it was to the federal government. It was recognized that the rule would allow some guilty criminals to go free because the police blundered, but the Court reasoned that the alternative would allow state courts to overlook the illegal practices by police officers in order to convict a guilty party.

Since the search of Ms. Mapp's home was clearly unreasonable her conviction was reversed because the state used illegally seized evidence to convict her.

C. THE WARNING OF RIGHTS AND CONFESSIONS:
Miranda v. Arizona (1966)

Facts

Ten days after a kidnapping and rape, Miranda was arrested and taken to the police station for questioning. Miranda was a 23-year-old man with a ninth-grade education. He came from a background of poverty and had recently been diagnosed by a doctor as emotionally disturbed. At the police station the victim of the crime identified Miranda as her assailant during a lineup of possible suspects. Police officers then took him to another room where he was questioned about the crime for two hours. He was not told of his right to refuse to answer any questions or his right to see an attorney. After first denying any guilt, he gave the officers a detailed oral confession and then wrote and signed a statement confessing to the crime. The statement included a pretyped paragraph which said that the confession was made voluntarily, without force or threats, and with full understanding of his rights. Miranda's confession was admitted into evidence at trial and he was convicted of the crimes charged.

Issues for Discussion

1. Was Miranda's confession voluntary? Did the police intimidate or coerce him?

2. Should a person being questioned by the police have the right to remain silent? Why? If so, should the police be required to inform the person of this right?

3. Should a person being questioned by the police have the right to have an attorney present during such questioning? Why? If so, should the police be required to inform the person of this right?

NOTES:

Decision of the United States Supreme Court

Before questioning criminal suspects in their custody, the police must warn the suspects: (1) that they have the right to remain silent; (2) that any statements made may be used as evidence against them; and (3) that they have a right to have an attorney present at the questioning.

NOTES:

Reasoning of the Court

Prior to *Miranda,* the Court in *Escobedo v. Illinois* (1964) ruled that if a suspect was continuously questioned after being denied his request to consult with his attorney, the Sixth Amendment right to counsel prohibited a confession from being used as evidence in court. After *Escobedo,* there was much confusion concerning the extent of this right to counsel.

The majority opinion of Chief Justice Warren in *Miranda* was the Court's attempt to clarify the issues involving the questioning of criminal suspects after being taken into custody by the police. Here, the Court found that protection against coerced confessions was based on the Fifth Amendment privilege against self-incrimination. The Court's major concern was the psychological coercion used by the police when questioning a suspect. The Court found that intimidating practices were used to pressure suspects into making confessions. In order that suspects could exercise their privilege against self-incrimination and combat this psychological intimidation, the Court ruled that they must be informed of their rights.

The Chief Justice stated that if suspects were informed of their right to remain silent as guaranteed by the privilege against self-incrimination, then the intimidation surrounding interrogations would be reduced. If suspects were warned that statements made would be used against them, then they would know the consequences of forfeiting the right to remain silent. If counsel was present or consulted during the questioning, the suspect's right to remain silent would be protected and the likelihood of coercion reduced. The Chief Justice believed that these guarantees would adequately protect the privilege against self-incrimination.

D. ELECTRONIC SURVEILLANCE: *United States v. White* (1971)

Facts

Federal agents suspected that White was involved in the sale of illegal drugs. They asked Jackson, who knew White, to conceal a transmitter on his body and converse with White about his drug activities. Jackson talked to White about White's drug activities at Jackson's home, in Jackson's car, and at a restaurant. The agents listened to and recorded all these conversations.

White was arrested and tried for the illegal sale of drugs. Jackson never testified at the trial, but the agents who listened to the conversations did testify against White. White was convicted and appealed to the United States Supreme Court.

Issues for Discussion

1. Should any of the conversations between White and Jackson be considered private? Why?
2. Is there a difference between Jackson testifying to what White said and the agents listening to the conversation and testifying to what they heard?
3. Should the agents have obtained a search warrant before asking Jackson to conceal the transmitter on his body in order to record the conversations with White?

NOTES:

Decision of the United States Supreme Court

NOTES:

Informers or government agents meeting with criminal suspects may carry concealed electronic devices designed to record or receive their conversations without obtaining a search warrant. Agents may testify in court concerning the conversations they heard.

Reasoning of the Court

From prior decisions the Court had carved a rule that criminal defendants had no privacy interest to be protected under the Fourth Amendment when they voluntarily inform other persons of their wrongdoing. The Court had applied this rule to situations where agents located elsewhere listened to the suspect's conversation with transmitting equipment. Such situations were considered searches, but no search warrant was required since the suspect's actions were voluntary. The Court reasoned that these situations were no different than the situation in this case where an informer carried the electronic devices on his body while agents recorded the conversation with the suspect. Although this situation was also considered a search, the Court held that a warrant was not required to authorize the informer to carry the concealed electronic devices. Furthermore, the electronic recording provided better evidence than the testimony of the informer since the recording was reliable. Thus, the search was legal.

E. SCHOOL SEARCHES: *People v. Scott D.* (1974)

NOTES:

Facts

Scott, a 17-year-old high school student, had been under observation by high school security people for six months for possible involvement in the sale of illegal drugs on the high school grounds based on information provided by a "confidential source." Scott had been seen eating lunch with another student suspected of involvement in drug sales at the school. On one day, Scott was seen by a teacher, twice during the same morning and within one hour, entering a school restroom with another student and then leaving within five to ten seconds. Another student also entered the restroom with Scott and stayed for some time. The teacher reported these occurrences to the school security authorities. The school security authorities reported Scott's activities to the school principal. After the principal told the security people to bring Scott to his office, Scott, in the presence of the principal and the dean, was told to strip down and be searched by the security person. Thirteen envelopes and a vial containing dangerous drugs were found in Scott's wallet.

Scott was adjudicated a youthful offender under New York law and sentenced to 90 days' imprisonment. Scott appealed the decision claiming that the search at school was illegal.

Issues for Discussion

1. Did the school authorities have sufficient facts to suspect that Scott was involved in illegal drug activity at school?
2. Should the same considerations for searches and seizures on the streets apply to searches and seizures in public schools? Why?
3. Should the Fourth Amendment prohibition against unreasonable searches and seizures apply to public schools? Why?

Decision of the New York Court of Appeals

The Fourth Amendment prohibition against unreasonable searches and seizures applies in the high school setting, and searches conducted without sufficient cause are invalid.

NOTES:

Reasoning of the Court

In most cases, a government officer must have probable cause to conduct a search. Probable cause means that the officer knows of facts and circumstances giving him a reasonable belief that evidence of a crime will be found in a particular place or on a particular person. However, some searches are allowed based upon a lesser standard than probable cause.

In this case, the New York court ruled that the Fourth Amendment provided protection to public-school students, but searches of students would be allowed if justified by sufficient cause—a lesser standard than probable cause. The court recognized that public-school authorities have a duty to maintain discipline and provide security. This duty, the court noted, may change the basis of probable cause to search, but random searches without cause were prohibited in high schools. It was indicated that sufficient cause was to be viewed by the circumstances of the situation, not the actual knowledge that an officer must have to satisfy the probable cause requirement. Thus, in determining sufficient cause to search, such factors as the student's age, record in school, and the seriousness of the problem regarding the search would be considered. The court did not find sufficient cause to search the student in this case because it was based on mere suspicions rather than facts and circumstances. Thus, the search was illegal.

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

Certain provisions in the Constitution contain express limitations on governmental activities in criminal investigations. These important limitations were adopted to protect all citizens against the excesses of law enforcement and to safeguard the privacy interests of each citizen. The Fourth Amendment provides such protection stating,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Other protective provisions applicable to criminal procedure are found in the Fifth Amendment, which provides that no person shall be compelled to incriminate himself in a criminal case, and the Sixth Amendment, which guarantees the accused in all criminal prosecutions the right to counsel. The due process provision of the Fourteenth Amendment, which applies to the states, has been held to incorporate these principles so that the states are subject to the same limitations.

These provisions represent fundamental limitations on the government's pursuit of evidence in criminal matters. In particular, they generate numerous issues in criminal procedure involving four areas: searches and seizures, confessions, identifications, and electronic surveillance. Another related area, not of constitutional dimensions, is entrapment. A discussion of the issues in these areas should focus on a balancing between adequate law enforcement techniques and the protected privacy interests of citizens.

B. SEARCH AND SEIZURE

1. The Fourth Amendment Protection

Under the Fourth Amendment, express protection is provided to "persons, houses, papers, and effects." These privacy interests are protected against unreasonable instrusions by government officers. The prohibition against unreasonable searches and seizures applies to governmental functionaries only, *i.e.*, the police, their agent, or informers. In determining what a search is, it is implied that an intrusion into hidden places must occur. In *Katz v. United States,* 389 U.S. 347 (1967), the Supreme Court discussed the perimeters of Fourth Amendment protection, stating that a search was an intrusion in an area "wherein privacy normally would be expected" by a person.

Two general rules should be stated regarding the Fourth Amendment and searches. First, since it is *unreasonable* searches and seizures that are prohibited, the legality of a search is determined by a standard of reasonableness. One example of this rule is the probable cause requirement, discussed below, which provides that an officer must have probable cause to conduct a search pursuant to a warrant. The probable cause requirement embodies a reasonableness standard. Second, the Fourth Amendment is generally interpreted to require that a warrant be obtained for a search whenever it is practicable to do so. *United States v. Watson,* 423 U.S. 411 (1976). However, as will be seen, there are important exceptions to the warrant requirement.

2. Searches Pursuant to a Warrant: The Probable Cause Requirement

If a valid search warrant is obtained prior to the search, the search will be considered reasonable *per se* if the search is conducted according to the warrant. A law enforcement officer may obtain a search warrant by submitting a sworn affidavit to a neutral and detached judicial officer. The affidavit must contain sufficient facts showing probable cause for the search and particularly describing the person, place, or object to be searched. Once the judicial officer is satisfied that probable cause to search exists, he or she may issue the search warrant. The probable cause requirement is designed to prevent law enforcement officers from arbitrarily encroaching upon a citizen's privacy interests. Probable cause means that facts and circumstances are known to an officer which are sufficient to justify a reasonable person in believing that seizable property would be found in a particular place or on a particular person. *Carroll v. United States,* 267 U.S. 132 (1925). If probable cause is based on information from an informer, the police officer must demonstrate that both the informer and the information provided are reliable. *Aguilar v. Texas,* 378 U.S. 108 (1964). False information in a warrant will not necessarily invalidate it, but if the defendant proves by a preponderance of the evidence that the police knowingly or recklessly made false statements to show probable cause, then the warrant is invalid. *Franks v. Delaware,* 438 U.S. 154 (1978).

3. Searches Without a Warrant

Not all searches by law enforcement officers are pursuant to a warrant; the most significant developments in the law pertaining to search and seizure concern warrantless searches. These searches are usually based on the urgency of the surrounding circumstances.

a. Searches Incident to Arrest

Searches incident to a lawful arrest, *i.e.*, an arrest based on probable cause, are the most important and frequently used exception to the search warrant requirement. In *Chimel v. California,* 395 U.S. 752 (1969) (also discussed in the Cases for Students section), the Supreme Court held that a search incident to a lawful arrest was valid only if limited to the person of the arrested suspect or the person's area of immediate control. The Court determined that the area of immediate control was where the suspect might reach for a weapon or destroy evidence.

In *United States v. Robinson,* 414 U.S. 218 (1973), the Court ruled that when police made a lawful arrest by taking a person into custody, a full body search incident to that arrest was permissible. Here, police found heroin on the accused after he had been arrested and taken into custody for driving without a license. The Court, in *United States v. Edwards*, 415 U.S. 800 (1974), held that a search was incident to arrest even when conducted after the booking process so long as it could have been made at the scene of the arrest and legitimate reasons for delay existed.

b. Automobile Searches

In *Carroll v. United States, supra*, the Supreme Court held that police could stop and search a moving automobile without a warrant if they had probable cause to believe it contained contraband items. This rationale was based on the premise that the mobility of automobiles allowed for the movement or destruction of evidence. As to parked cars, the Court has held that a search of the defendant's car parked in his private driveway was unlawful where the premises were under police surveillance, the defendant was already arrested, and the car was no longer being used for an illegal purpose. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

What principles apply where the vehicle is taken to the police station? In *Texas v. White*, 423 U.S. 67 (1975), the Court ruled that if a car was stopped, the occupants were arrested, and the car was taken to and searched at the police station, then the search would be lawful since it could have been made when the vehicle was stopped on the street.

Another instance involving automobiles is where the accused is in another person's car. In *Rakas v. Illinois*, 439 U.S. 128 (1978), the defendants were passengers in a car driven and owned by a friend. The car fit the description of a car involved in a recent robbery. Police officers stopped and searched the car, finding rifle shells in the locked glove compartment and a rifle under the seat. The Court noted that the essential question was whether the defendants had a legitimate expectation of privacy in the place searched. The search was held to be valid since the defendants had no possessory or property interest in the property seized and no expectation of privacy in the glove compartment as passengers.

In another important case, *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that vehicles driven on public streets were not subject to random police stops for license and registration checks. The Court found that such random checks were overly intrusive in that they were not conducted according to any procedure or guidelines, and other alternatives, such as checks on license plates or license renewal systems, were available.

Is there an expectation of privacy for packed items found during an automobile search? In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court said yes. The Court held that police are required to obtain a warrant before searching luggage taken from a car even though the car is properly stopped and searched for contraband. However, it was noted that this rule was inapplicable to security searches of luggage in airports or searches incident to the lawful arrest of the possessor of luggage.

c. Consent Searches

When a party consents to a search, no warrant, probable cause, or exigent circumstances are required. Thus a preference by police to conduct searches by consent is easily understood. However, two issues must be addressed in reviewing such searches.

First, the consent must be shown to have been voluntary and not the product of coercion or duress. Voluntariness is determined by a totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consent given on the basis of deception by the police (*e.g.*, officer demands entry claiming he has a search warrant but really no valid warrant) is not voluntary. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

The second issue concerns the authority to consent. The Supreme Court stated the general rule in *United States v. Matloc*, 415 U.S. 164 (1974) holding that consent may be given by the defendant or any third party with common authority to the premises or property. Common authority means that the party has joint access to or control over the property. Thus in *Matlock*, a woman who lived with the defendant could give consent to search the bedroom. However, a hotel clerk has no common authority over a patron's room and cannot give consent to search the room. *Stoner v. California*, 376 U.S. 483 (1964). A friend who shares a duffel bag with a defendant could give consent to search the bag. *Frazier v. Cupp*, 394 U.S. 731 (1969).

d. Other Exceptions

An emerging concept in the law of search and seizure is the plain view rule. A combination of Supreme Court cases indicates that, during a search with or without a warrant, evidence in the police officer's plain view may be seized. In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Court explicitly allowed seizure of such evidence during a warrantless search of an impounded vehicle. Language in *Coolidge, supra*, suggests that during a search pursuant to a warrant, evidence not described in the warrant but in the police officer's plain view may be seized. Recently, in *Colorado v. Banninster*, 449 U.S. 1 (1980), the Court upheld the search and seizure of suspected stolen items in a car which had been stopped for speeding, noting that the police officer had probable cause to search because during the stop the items were in the officer's plain view.

An exigency justifying a warrantless search has been recognized in the "hot pursuit" doctrine. In *Warden v. Hayden*, 387 U.S. 294 (1967), the Court held that when police officers are in "hot pursuit" of a fleeing and dangerous offender they may search the premises to which the offender has escaped. However, in *Payton v. New York*, 445 U.S. 573 (1980), the Court explicitly ruled that the Fourth Amendment prohibits police from making a warrantless, nonconsensual entry into a suspect's home in order to make a routine felony arrest. The opinion included the implication that this prohibition also applied to warrantless, nonconsensual entries in order to search.

e. Stop and Frisk

In another category of cases, the Supreme Court has permitted the limited search of a criminal suspect without probable cause to arrest. In a major case, *Terry v. Ohio*, 392

U.S. 1 (1968), the Court stated that if facts and circumstances gave a police officer a reasonable belief that "criminal activity may be afoot," and the officer had a reasonable belief that the suspect is armed and presently dangerous, the officer can conduct a limited "pat-down" search (*i.e.*, "frisk") of the suspect's outer clothing to find weapons, and can seize any weapons discovered. A related case, *Adams v. Williams*, 407 U.S. 143 (1972), held that the police officer's reasonable belief for the stop and frisk may be based on reliable information from an informer without the corroboration required by *Aguilar, supra.*

The *Terry-Adams* stop and frisk rule has been the subject of numerous court decisions. In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Court held that police officers must have specific facts showing a reasonable belief that the suspect was armed and presently dangerous. The Court said that the pat-down search may only be for weapons and not for evidence. In *Pennsylvania v. Mims*, 434 U.S. 106 (1977), the Court noted the inherent danger to police during traffic stops and ruled that an officer who directed a traffic offender to stop may order the driver out of the car. In a recent case, *United States v. Cortez*, 449 U.S. 41 (1981), the Court first noted that in determining the legality of a stop, the "whole picture" would be taken into account; second, such a stop would be upheld where the police officers had a specific basis for suspecting wrongdoing.

4. The Exclusionary Rule

For several years, the courts have been concerned about methods to protect citizens against unreasonable searches and seizures. In order to control the excesses of law enforcement, a judicially created doctrine known as the exclusionary rule has been imposed. In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court ruled that evidence obtained by federal officers conducting an illegal search and seizure of a defendant or his property cannot be used in criminal proceedings against him. Although many states applied this rule in state proceedings, not until the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) (also discussed in the Cases for Students section) was the exclusionary rule uniformly applied to all state proceedings.

The exclusionary rule has continued to be a source of controversy. Those in favor of the rule argue that it deters police abuses in searches and seizures, protects the integrity of the courts by prohibiting judicial ratification of illegal practices, and insures that governmental illegality will be challenged. Those against the rule argue that since both the illegally seized evidence and the "fruits" thereof (evidence directly or indirectly derived from the illegally seized evidence) are excluded, relevant evidence becomes inadmissible because of the technically illegal seizure, thus allowing a guilty defendant to go free. Other arguments against the rule are that it engenders widespread public disrespect for the judicial process and has not been shown to be a deterrent to police abuses in searches and seizures.

Limitations on the exclusionary rule have developed that allow for the admissibility of "tainted" evidence. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court said that the "fruit" of the illegal search is admissible where the relationship between it and the illegally seized evidence is "dissipated of the taint" of illegality (*e.g.*, police arrest a suspect and illegally search his car but lawfully search the suspect and find a gun in his pocket). Also, courts will look at the circumstances of a case to determine if a party contesting the legality of a search has a legitimate interest in the property or premises that were searched. If the party does not have such an interest, then he has no "standing" and cannot request the exclusion of the illegally seized evidence. Finally, illegally obtained evidence may be used to discredit a defendant's testimony.

5. Search and Seizure and Young People

Generally, the Fourth Amendment prohibition against unreasonable searches and seizures applies to youths in the same manner that it applies to adults. However, it should be remembered that young people have a special status in law as recognized by the juvenile justice system. (*See* CRIMINAL JUSTICE SYSTEM Section). Also, there are special circumstances involving youths, *e.g.*, the school setting, curfew laws, parental supervision, etc. Thus the courts must consider these factors when analyzing search and seizure issues involving youths.

For example, if a youth is taken into custody for a curfew law violation, may the police conduct a warrantless search incident to the arrest? Courts are divided. Some courts have said yes based on a stated necessity to search any person upon custodial arrest. *State v. Smithers*, 256 Ind. 512 (1971). Other courts have said no because when a youth is taken into custody for a curfew violation, it is for the protection of the youth and thus not an arrest. *In re B.M.C.*, 32 Colo. App. 79 (1973).

Most courts have ruled that parents may consent to the search of their child's personal area of the home (*e.g.*, the bedroom) notwithstanding the child's refusal to consent. The rationale here is deference for broad parental authority. *Vandenberg v. Superior Court*, 8 Cal. App. 3d 1048 (1970). However, a Michigan court refused to follow this rule, stating that paramount consideration must be given to the youth's legitimate privacy interests under the Fourth Amendment. *People v. Flowers*, 23 Mich. App. 523 (1970).

Other areas involving special circumstances are school locker searches and searches of students while in school. A Kansas court held that the Fourth Amendment provided no protection for the student's privacy in school lockers because school administrators must have the authority to inspect lockers in order to maintain discipline and protect the welfare of all students. In the balance between the student's privacy interests and the maintenance of order, this court tipped it in favor of the latter consideration. *State v. Stein*, 203 Kan. 638 (1969). However, a New York court held that the Fourth Amendment did apply in the school setting. Thus a warrantless search of a student without sufficient cause was an unreasonable search in violation of the Fourth Amendment. *People v. Scott D.*, 34 N.Y. 2d 483 (1974) (included in Cases for Students). The above decisions demonstrate the conflicting attitudes that also permeate the juvenile law area regarding concern for the welfare of young people and the extension of rights to them. Consequently, where special factors involving youths are present, the courts are much more likely to engage a balancing approach between the young person's welfare and his or her privacy interests.

C. CONFESSIONS

1. Voluntariness

In most criminal investigations, the police will question a suspect to obtain a confession. Because of the incriminating nature of confessions and the potential for abuse, limitations have been placed on law enforcement to insure the reliability of confessions and prevent abusive practices in obtaining statements.

The Fifth Amendment states, "No person shall be compelled in any criminal case to be a witness against himself." Involuntary or coerced confessions have long been held in violation of the Fifth Amendment in federal courts and in violation of due process under the Fourteenth Amendment in state courts. *Brown v. Mississippi,* 297 U.S. 278 (1936). In *Brown,* confessions obtained through physical brutality were held to be clearly involuntary. The modern rule concerning voluntariness is that statements given by a criminal suspect must be the product of a free and rational choice as determined by a totality of the circumstances, *e.g.*, warning of constitutional rights, duration of detention, etc. *Greenwald v. Wisconsin,* 390 U.S. 519 (1968).

2. Warnings

According to many courts, the voluntariness standard has been considered inadequate to control some police practices involving subtle coercion and intimidation. Also, the courts have found that many criminal suspects were ignorant of their rights and of the criminal law.

The Supreme Court began to develop a new approach in its attempt to resolve these problems. In *Escobedo v. Illinois,* 378 U.S. 478 (1964), an emerging concept unfolded which was based on the Sixth Amendment right to counsel. The Court held that a confession was inadmissible if during a criminal investigation the suspect was continuously interrogated after being denied his request to consult with an attorney. In 1966, the Court clarified the concept created in the *Escobedo* decision. In *Miranda v. Arizona,* 384 U.S. 436 (1966) (included in the Cases for Students section), the Court announced that pursuant to the Fifth Amendment privilege against self-incrimination, before any custodial interrogation of criminal suspects, the police must warn suspects: (1) that they have the right to remain silent; (2) that any statements made may be used as evidence against them; and (3) that they have a right to have an attorney, either retained or appointed, present at the interrogation. The Court described a custodial interrogation as questioning a person in custody or depriving one of "freedom of action." Any waiver of the outlined rights would have to be made voluntarily, knowingly, and intelligently, and if the suspect indicated that he or she wished to consult with an attorney, then the interrogation would have to end.

The rationale of the *Miranda* doctrine is intended to prevent police from taking advantage of the suspect's ignorance or psychological weaknesses, to reduce the likelihood of a coercive or involuntary forfeiture of the suspect's rights, and to give police uniform guidelines for conducting custodial interrogations.

Critics of the *Miranda* doctrine have charged that it punishes law enforcement for unintentional, technical errors in procedure; allows confessed offenders to go free based on these technical procedural errors; and confuses rather than clarifies law enforcement procedures. Congress attempted to overturn *Miranda* in the Omnibus Crime Control and Safe Streets Act of 1968 making voluntariness the sole determinant of the admissibility of confession. The Supreme Court has yet to address the constitutionality of this legislation.

Later cases have attempted to answer some unresolved issues concerning the *Miranda* doctrine. Incriminating statements obtained in violation of the *Miranda* rules are admissible against the defendant for impeachment purposes. *Harris v. New York,* 401 U.S. 222 (1971). The assertion of the right to remain silent at one custodial interrogation does not bar later interrogation about another criminal matter. *Michigan v. Mosley,* 423 U.S. 96 (1975). But once the accused asserts his right to have counsel present at one custodial interrogation, he may not be subjected to further interrogation the next day without counsel being present. *Edwards v. Arizona,* 451 U.S. 477 (1981). A conversation between police while transporting a suspect to the police station concerning the whereabouts of a gun was not an interrogation even though the suspect interrupted the conversation and led the officers to the gun, since the officers did not know that their conversation was likely to elicit a response from the suspect. *Rhode Island v. Innis,* 446 U.S. 291 (1980). If a suspect has been illegally detained and given the *Miranda* warnings his confession may be excluded based upon such factors as the time between the arrest and the confession, intervening circumstances, and flagrant police misconduct. *Dunaway v. New York,* 442 U.S. 200 (1979). If a suspect in custody fails to expressly waive his right to counsel after the police have given him the *Miranda* warnings, exclusion of the suspect's subsequent incriminating statements is not required. *North Carolina v. Butler,* 441 U.S. 396 (1979).

3. Unnecessary Delay

In two decisions, the Supreme Court has fashioned another rule to insure the reliability of confessions. In *McNabb v. United States,* 318 U.S. 332 (1943) and *Mallory v. United States,* 354 U.S. 449 (1957), the Court held that statements made by a detained suspect during a period of unnecessary delay between the time of arrest and the time of arraignment must be excluded because such practices would violate federal criminal procedure rules requiring prompt arraignments. Unnecessary delay is usually described in terms of oppressive circumstances. The *McNabb-Mallory* rule only applies in federal courts, but many states have adopted similar speedy arraignment rules.

Congress attempted to overturn the *McNabb-Mallory* rule as it did the *Miranda* doctrine in the Omnibus Crime

Control and Safe Streets Act of 1968. The Act provides that statements made voluntarily within six hours after the arrest and detention are admissible even though the defendant has not been arraigned. Under the Act, voluntariness is the determinative factor. The Supreme Court has not directly ruled on the constitutionality of this statutory provision.

D. IDENTIFICATION

Law enforcement officers often conduct lineups of criminal suspects for identification purposes. Such identification procedures are subject to constitutional rules to prevent any unfairness that may result in mistaken identity due to suggestive procedures. A defendant has the right to have counsel present at a lineup conducted after formal charging or at a preliminary hearing where identification is to be made, but there is no right to have counsel present at a lineup before formal charging. *Moore v. Illinois,* 434 U.S. 220 (1977), *Kirby v. Illinois,* 406 U.S. 682 (1972).

The defendant's due process rights are violated where the identification procedure is so suggestive as to create a real and substantial likelihood of mistaken identity. *Stovall v. Denno,* 388 U.S. 293 (1967). The courts look at the totality of the circumstances involving such factors as the witness' degree of attention at the time of the identification, the length of time between the crime and the identification, and the witness' certainty in making an accurate identification. *Manson v. Brathwaite,* 432 U.S. 98 (1977). Identifications made from photographs, or "mug shots," have been approved and a suspect has no right to have counsel present at such identifications. *United States v. Ash,* 413 U.S. 300 (1973).

E. ELECTRONIC SURVEILLANCE AND ENTRAPMENT

Law enforcement utilizes controversial techniques involving electronic surveillance and informers to gather evidence against suspects of crimes, especially in sophisticated operations of organized crime and "white collar" crime. The Supreme Court has applied Fourth Amendment restrictions to this form of surveillance, which usually involves covert wiretapping or bugging to intercept communications between parties.

As the law first developed, the Court held that wiretapping did not violate the Fourth Amendment unless there was a "trespassory invasion into a constitutionally protected area." *Goldman v. United States,* 316 U.S. 129 (1942). In *Katz v. United States, supra,* the Court ruled that the Fourth Amendment "protected people, not places," and a person's private communications should be protected in "an area wherein privacy normally would be expected." Therefore, most forms of electronic surveillance require prior judicial authorization to meet Fourth Amendment requirements. However, one party to the communications may consent to interception of the communication without prior court approval since the Fourth Amendment requirements are not applicable. *United States v. White,* 401 U.S. 745 (1971) (included in the Cases for Students section). In national security matters involving domestic organizations, the Fourth Amendment applies so that electronic surveillance of such organizations requires prior court authorization. *United States v. United States District Court,* 407 U.S. 297 (1972).

Although the Katz decision applied the Fourth Amendment to electronic surveillance by law enforcement, federal law allows for the interception of private communications within statutorily prescribed procedures. The federal Wiretap Act of 1968 permits interceptions by wiretaps pursuant to authorization by a federal or state court order where probable cause is shown. This Act was approved in *United States v. Donovan,* 429 U.S. 413 (1977). Recently, in *Dalia v. United States,* 441 U.S. 238 (1979), the Court held that under the Act a court order for electronic surveillance may permit a forcible covert entry into a private premise for the purpose of installing a listening device.

Frequently, law enforcement utilizes informers to gather evidence and information in criminal investigations. In *Hoffa v. United States,* 385 U.S. 293 (1966), the Supreme Court rejected the appellant's constitutional challenges to the use of an informer's testimony concerning confidential incriminating communication between the appellant and the informer.

The basic limitation on law enforcement's use of informers is the defense of entrapment. This defense allows a defendant to prove that impermissible police inducement rather than the defendant's own conduct led to the commission of a crime. If the prosecution proves that the defendant was predisposed to commit the crime despite the inducement, then the defense fails. *Hampton v. United States,* 425 U.S. 484 (1976). The recent "Abscam" investigation of members of Congress demonstrates how entrapment issues may arise as a result of aggressive law enforcement.

F. CONCLUSION

As a result of the many landmark cases handed down by the Supreme Court during the 1960's, many commentators refer to the period as the "Criminal Law Revolution." Court decisions such as *Mapp, Miranda,* and *Katz* provide the foundation for a contemporary interpretation of issues in criminal procedure. The emphasis then appeared to focus on regulating law enforcement conduct with an expansive interpretation of the rights of an accused in the criminal process.

Some argue that the period of the 1970's involved a reevaluation of the controversial horizons reached by the Court in the 1960's. Evidence of this shift may be observed in current cases where exceptions have been carved out of the exclusionary rule and the *Miranda* doctrine. Nevertheless, even with a change in emphasis, cases indicate that the court remains cautious in its evaluation of these significant cases and vigilant in safeguarding the basic privacy interests of citizens as protected by the Fourth Amendment.

3. Free Expression

Cases for Students

A. Speech Advocating Unlawful Conduct
Brandenburg v. Ohio, 395 U.S. 444 (1969)
Can a state prohibit speech advocating unlawful conduct?

B. Student Expression
Tinker v. Des Moines School District, 393 U.S. 503 (1969)
Do public school students have the right to wear armbands during school hours to protest against the Vietnam War?

C. Regulating Demonstrations
Adderly v. Florida, 385 U.S. 39 (1966)
Do demonstrators have the right to conduct their demonstrations on the grounds of the local jail?

D. The Unpopular Speaker
Feiner v. New York, 340 U.S. 315 (1951)
Does a speaker making a controversial speech on a public street have the right to continue the speech even though his audience disapproves?

E. Press Coverage of Criminal Proceedings
Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979)
Does the press have a right to cover pretrial criminal proceedings?

Summary of the Law for Lawyers and Teachers

A. Introduction
B. Speech Advocating Unlawful Conduct: The Consequence Test
  1. The "Clear and Present Danger" Test
  2. The Imminency Requirement
  3. Rejection of the Imminency Requirement
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C. Symbolic Expression
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E. Time, Place, and Manner Restrictions on Expression
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3. Freedom of Expression

Cases for Students

A. SPEECH ADVOCATING UNLAWFUL CONDUCT: *Brandenburg v. Ohio* (1969)

NOTES:

Facts

Mr. Brandenburg, a Ku Klux Klan leader, invited a television reporter to a Klan rally. The reporter filmed the rally and later broadcast it on television.

The film showed persons wearing hoods over their heads gathering to burn a cross. Statements about "niggers" and "Jews" were continually made, demanding that they be forced to leave the country, with violence if necessary.

Brandenburg remarked that "personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Brandenburg was arrested for violating a state law prohibiting "advocating sabotage, violence, or unlawful methods of terrorism as a means of accomplishing reform." He was convicted and appealed to the United States Supreme Court.

Issues for Discussion

1. Did Mr. Brandenburg's speech advocate unlawful conduct? What unlawful conduct?

2. Should the state be allowed to prohibit a person's speech advocating unlawful conduct when there is no immediate danger that such conduct will occur? What if there is an immediate danger of unlawful activities?

3. Can a person be arrested for or prohibited from making insulting remarks about others?

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Decision of the United States Supreme Court

Speech advocating unlawful conduct cannot be prohibited except where the speech is directed at producing immediate unlawful conduct and it is likely to produce such conduct. Thus the state law is unconstitutional, and the defendant's conviction is reversed.

Reasoning of the Court

The First Amendment to the Constitution provides that Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In this case, the Court found that the state law punished the general advocacy of certain actions. The Court reasoned that speech advocating particular actions could not be punished if it was not immediately dangerous. If the speech was not immediately dangerous, then the person was protected by the First Amendment's guarantee of freedom to express one's ideas.

NOTES:

B. STUDENT EXPRESSION: *Tinker v. Des Moines School District* (1969)

NOTES:

Facts

A group of students decided to wear black armbands to school as a protest against United States participation in the Vietnam War. When principals of the Des Moines public schools heard of the plan, they immediately adopted a policy prohibiting students from wearing armbands during school hours.

Knowing the new rule, seven students wore the armbands anyway. When they attended classes, there were no disruptions of regular class activities nor were there any demonstrations. Some angry remarks were directed at the students wearing the armbands.

In the afternoon, the principal told the students to remove the armbands, but they refused. The principal suspended them from school. Mr. Tinker, a parent of two of the protesting students, sued the school system, claiming his children were denied the right of free expression.

Issues for Discussion

1. Was the wearing of armbands a form of expression?
2. Would the First Amendment protect one of the protesting students in making a speech against the Vietnam War in the middle of mathematics class?
3. Would it affect your decision if the principals had adopted a policy ten years ago prohibiting the wearing of all armbands, buttons, or other items not related to school activities?
4. How would your decision be affected if students in favor of the Vietnam War caused a disruption in school because the protesting students wore the armbands?

Decision of the United States Supreme Court

The wearing of armbands to express opposition to the Vietnam War is a form of expression protected by the First Amendment.

NOTES:

Reasoning of the Court

The Court first decided that students and teachers had a right of free expression in school. It was noted that the wearing of armbands by the students was a form of symbolic speech similar to speech entitled to full constitutional protection. Also, the Court ruled that the principals' new rule was aimed at prohibiting the students from expressing their views. Therefore, the rule violated the students' right to express their views. The Court found no evidence that the students' action harmed schoolwork or the rights of other students. However, the Court said if students' expressive conduct directly and substantially interfered with the operation of the school, then such conduct could be prohibited.

Justice Black dissented on the grounds that the school authorities should have the power to determine disciplinary regulations for the schools. He found that the policy against wearing the armbands was a reasonable school policy to prevent disruptive and distracting activities in the schools.

C. REGULATING DEMONSTRATIONS: *Adderley v. Florida* (1966)

NOTES:

Facts

Nearly 200 students from Florida A. & M. University staged a demonstration at the county jail to support other students who had been arrested the day before for protesting against racial segregation. During the demonstration at the jail, the students were asked by a deputy sheriff to move away from the jail entrance. When the students did move, some partially blocked a driveway to the jail which was used for official purposes only. When the sheriff arrived, he told the students they were trespassing on jail property and would have to leave. Most of the demonstrators did not leave, and they were arrested for trespassing.

Issues for Discussion

1. Was the demonstration a form of free expression?
2. Should the demonstration have been allowed on the jail grounds? Why? To protest the jailing of the students on the previous day, where could the demonstrators have their demonstration?
3. Under what conditions should government authorities be allowed to regulate demonstrations or gatherings on public property?

Decision of the United States Supreme Court

Since the law enforcement authorities had the power to control the use of the jail grounds, the demonstrators had no constitutional right to demonstrate on the property.

Reasoning of the Court

The main basis of the Court's decision was that the demonstration was subject to control by the law enforcement authorities because of its location. Thus the demonstrators' constitutional right to peacefully assemble was limited. The Court focused on the evidence indicating that demonstrators were on the jail grounds blocking the passage of the driveway. It was emphasized that the driveway was not opened to the public but used for official purposes only. The Court said the jail grounds were not for general public use because security had to be maintained at the jail.

In a dissenting opinion, Justice Douglas held that the jail grounds were the proper place to exercise the demonstrator's constitutional rights. He believed that the state authorities were using the trespass law to penalize the demonstrators for exercising their constitutional rights.

NOTES:

D. THE UNPOPULAR SPEAKER: *Feiner v. New York* (1951)

NOTES:

Facts

Feiner began making a speech while on a city street corner. He wanted to publicize a political meeting to take place that evening. A crowd of about 80 people had gathered along with two police officers.

In the speech, Feiner referred to the President as a "bum," and he called the mayor "a champagne-sipping bum." Then he said that "Minorities don't have equal rights; they should rise up in arms and fight for them."

As Feiner continued, there was some pushing and shoving in the crowd. One listener told the police officers that if they did not get Feiner "off the box," he would do it. The police officers told Feiner to stop, but Feiner continued anyway. Feiner was arrested for disorderly conduct.

Issues for Discussion

1. Was Feiner's speech likely to produce an immediate danger of disorder?
2. Who were the police officers protecting? Feiner himself? Feiner's expression? The general public?
3. Who should have been arrested—Feiner or the listener who made the threat?

Decision of the United States Supreme Court

Law enforcement authorities may require a speaker to stop making a speech on a public street when the authorities determine that the speech is a clear danger to preserving order.

NOTES:

Reasoning of the Court

The Court believed that Feiner's speech passed the limits of persuasion and instead was an incitement to riot. Because there was a clear and immediate danger of riot and disorder, the Court held that the officers must be allowed to order that Feiner stop making his speech. According to the Court, it was the duty of the officers to maintain order on the streets. Looking to the particular facts of this case, the Court said that because Feiner encouraged hostility among the audience, interfered with traffic on the public streets, and ignored the officers' order to stop talking, his conviction for disorderly conduct did not violate his constitutional right of free expression.

Justice Black strongly disagreed in a dissenting opinion. The justice shifted his focus to the unpopular speaker. According to Justice Black, Feiner had been arrested for expressing unpopular views. He asserted the police officers had a duty to protect Feiner during his speech rather than to arrest him, since Feiner was exercising his constitutional right of free expression. In his view, it was the duty of law enforcement authorities to protect a person exercising his constitutional rights from those who threatened to interfere.

E. PRESS COVERAGE OF CRIMINAL PROCEEDINGS: *Gannett Co., Inc. v. DePasquale* (1979)

NOTES:

Facts

Two Rochester, New York, newspapers, the Democrat & Chronicle and the Times-Union, both owned by the Gannett Company, had written a series of stories concerning the investigation of a murder in the area. Both papers continued to cover the story after two suspects had been apprehended and accused of the slaying. The two suspects were subsequently indicted for second degree murder, robbery, and grand larceny, and both men pleaded not guilty to the charges. Before the criminal trial on the charges, a hearing was held before Judge DePasquale to determine if certain evidence should be admitted at the trial. At this hearing, attorneys for the defendants requested that the public and the press be excluded from attendance because the prior publicity about the case was harming the ability of the defendants to receive a fair trial. The prosecutor did not oppose the exclusion and neither did the newspapers' reporter who was present. The next day the reporter wrote a letter to the judge asserting a right to cover the hearing and see the record of the hearing. Judge DePasquale responded stating the hearing was completed and reserving decision on reviewing the record. Later, the judge held that the interests of the press in covering the pretrial hearing were outweighed by the defendant's right to a fair trial. He therefore denied the reporter's request to review the record of hearing. The newspaper owners appealed Judge DePasquale's decision to the United States Supreme Court.

Issues for Discussion

1. How can the press affect a criminal defendant's right to a fair trial?
2. Should the public and the press have the right of access to all criminal proceedings?
3. What special circumstances would call for the exclusion of the public and the press from criminal trial proceedings?

Decision of the United States Supreme Court

The press has no constitutional right of access to pretrial criminal proceedings.

Reasoning of the Court

Every defendant in a criminal case has a right to a fair trial, which includes the right to be free from negative publicity before the trial. This latter right protects a defendant from being tried by jurors who have already decided the defendant's guilt because of what they read or heard from the media.

Justice Stewart, writing for the majority, believed that the publicity concerning the hearing posed a risk of unfairness because it may have influenced public opinion against the defendant and informed potential jurors of incriminating information.

Justice Blackmun wrote a dissenting opinion concurred in by three other justices. In his view the Sixth Amendment guarantee of a fair trial protected the right of the public and the press to attend criminal proceedings. According to Justice Blackmun, only where substantial harm would be done to the defendant's rights could the press and the public be excluded from the criminal proceedings.

NOTES:

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These guarantees have been recognized as protected liberty interests under the concept of due process of law in the Fourteenth Amendment. Since the Fourteenth Amendment is applicable to the states, the incorporation of First Amendment rights into the concept of due process of law make these rights applicable to the states.

It has been said that the right of free expression is the cornerstone of a free society. This right assures that a continual means of communication will exist between citizens and their government. It also protects the right of citizens to enlighten themselves and remain informed of ideas and events around them.

But the right of free expression is not absolute. It is subject to restriction by the government in order to protect the public interest in peace and order. A speaker does not always have the right to say what he wishes, where he wishes, and when he wishes. Justice Holmes' famous statement reflects this notion when he said in *Schenck v. United States*, 249 U.S. 47 (1919), ". . . free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Thus, it has been recognized that the state's interest in preserving peace and order is superior to an absolute right of expression. It is this balance between the state's interest and the right of expression that is the central focus of this discussion.

B. SPEECH ADVOCATING UNLAWFUL CONDUCT: THE CONSEQUENCE TEST

One of the central problems regarding free speech is the advocacy of unlawful conduct that may have particularly harmful consequences. Over the years, the Supreme Court has formulated a test to scrutinize regulation of speech advocating unlawful conduct which looks at the likely consequences of such speech and the context in which it was made. Many times a speech advocating unlawful conduct was critical of the government during periods of national stress. Other times, it was subversive speech advocating radical change in the government or abolishing the government.

1. The "Clear and Present Danger" Test

During the First World War, federal laws prohibited causing or attempting to cause insubordination in the military service or advocating resistance to the United States government. These laws were designed to forbid conduct harmful to the war effort.

In *Schenck v. United States, supra*, the defendant was convicted of violating these federal laws after circulating leaflets advocating resistance to the draft. In Justice Holmes' opinion, the defendant was properly prosecuted for violating the federal laws because the leaflets had a tendency to induce draft resistance and were circulated with that intent. Justice Holmes said, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the serious evils that Congress has a right to prevent." This was the first statement of the "clear and present danger" test. Thus, in determining whether speech advocating unlawful conduct could be prohibited, the context of the speech was to be viewed and a determination made of the tendency of the words to produce a "clear and present danger" of a substantive evil.

2. The Imminency Requirement

Justice Brandeis added an important element to the "clear and present danger" test in *Whitney v. California*, 274 U.S. 357 (1927). He stated that three elements must be present under the test: (1) the evil must be serious, *e.g.*, the violent overthrow of the government; (2) the evil is likely to occur, *e.g.*, a great potential for rebellion; and (3) the evil must be *imminent; e.g.*, an immediate danger of rebellion. The imminency requirement was Justice Brandeis' important addition. He believed that speech advocating a remote danger could not be prohibited, since such a danger would be speculative.

3. Rejection of the Imminency Requirement

However, in *Dennis v. United States*, 341 U.S. 494 (1951), the Court discarded the imminency requirement. The Smith Act, enacted during the Second World War, prohibited advocacy of the violent overthrow of the government and knowingly being a member of an organization advocating violent revolution. Several leaders of the Communist Party were prosecuted under the Act, but during their trials there was little evidence that any of them advocated violent acts or specifically planned for a violent revolution. Chief Justice Vinson wrote the Court's opinion stating, "the gravity of the 'evil' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger." Therefore, rather than look at the imminency of the evil, the Court looked at the seriousness of evil. If the evil was sufficiently serious, *e.g.*, overthrowing the government, then speech advocating such a serious evil could be prohibited.

4. Return of the Imminency Requirement

However, the Court in later years was uncomfortable with the absence of the imminency requirement. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (included in the Cases for Students), the Court held that a speech advocating the need for violent conduct or the abstract teaching thereof could not be prohibited "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Court construed *Dennis, supra*, and other prior cases as requiring "imminent lawless action." Thus after *Brandenburg*, a speech involving the advocacy of unlawful conduct in abstract terms, *e.g.*, speaking to the need for revolution, could not be prohibited. If the speech is made with an intent to produce imminent unlawful action (*e.g.*, "Let's burn down City Hall") and it is likely to produce such action (*e.g.*, the mob is carrying torches outside City Hall), then the speech itself could be prohibited.

Although the Court has not agreed on a precise formulation of the "clear and present danger" test, it will utilize this approach when focusing on speech advocating unlawful conduct. The Court will also engage in balancing the public interest against the individual's right of free expression, but the major consequence test is the "clear and present danger" test.

Consequently, some problems arise when the "clear and present danger" test is used. For example, courts have difficulty in determining how imminent or serious the danger must be. Also, courts have difficulty in employing the test in a case-by-case fashion since the factual setting of each case is different when viewing the consequences of the expressive conduct.

C. SYMBOLIC EXPRESSION

Under the First Amendment, speech is not only verbal or written communication but may take a variety of forms including symbols and gestures. For example, the wearing of armbands as means of protest is a form of symbolic expression. In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), a case discussed below, the Supreme Court held that symbolic expression "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."

Another example of symbolic expression was in *Cohen v. California*, 403 U.S. 15 (1971). While in a local courthouse, Cohen wore a jacket which bore the words, "F . . . the Draft" on the back. He was arrested and convicted of disturbing the peace. The Supreme Court employed a balancing approach between the governmental interest in preserving peace and Cohen's symbolic expression. The Court held that a general fear of a breach of the peace was not sufficient to convict Cohen, since there was no showing that Cohen's conduct was designed to instigate a violent confrontation. Looking to the consequences of Cohen's conduct, the Court found that he could not be punished on the vague basis that his conduct was generally offensive.

In *United States v. O'Brien*, 391 U.S. 367 (1968), however, the Court held that the burning of a draft card on the steps of a local courthouse to protest against the draft was not symbolic conduct entitled to First Amendment protection. O'Brien had been convicted of violating a federal law forbidding willful mutilation or destruction of draft cards. The Court found that the statute had nothing to do with speech, but rather related to the government's legitimate purpose of requiring draft registrants to carry their draft cards and not destroy them.

D. STUDENT EXPRESSION

The beginning point of a discussion of free expression in the schools is the important case of *Tinker v. Des Moines School District, supra* (included in Cases for Students). In this case, the Supreme Court said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Thus the right of free expression applies in the school setting.

In *Tinker*, public school students active in the anti-war movement decided to wear armbands to school to protest against the Vietnam War. When the principals of the Des Moines schools heard of the plan, they adopted a policy prohibiting the wearing of armbands during school hours. Nevertheless, the students wore their armbands to school and were suspended until they would return to school without their armbands. In a constitutional challenge to the no-armband rule, the Court held that the prohibition was aimed at the expression conveyed by the armbands and thus constituted a restriction on the expression of student views. The Court said there was no evidence that wearing the armbands disrupted school activities. However, the opinion implied that two limitations on students' First Amendment rights may be allowed: (1) school authorities may restrict expression if they can "forecast substantial disruption of or material interference with school activities"; (2) it was implied that a general prohibition on the wearing of all controversial symbols may be appropriate in explosive situations; (3) it was also implied that the decision had no application to student dress and grooming codes.

In *Guzick v. Drebus*, 431 F.2d 594 (1970), a federal appellate court upheld a long-standing school rule prohibiting the wearing of all symbols. The court found that the wearing of controversial symbols had caused substantial disruption in the past and would have aggravated an already tense situation.

E. TIME, PLACE, AND MANNER RESTRICTIONS ON EXPRESSION

Implicit in the guarantee of free expression are allowances for reasonable time, place, and manner regulations by the government. A student cannot demand the right to make a speech on "legalizing marijuana use" during English class. A citizen cannot demand a right to have a "morality rally" on Main Street during rush hour. The right of free expression must be balanced against the public interest in peace and the maintenance of order. A neutrality principle is also recognized regarding time, place, and manner regulations, holding that the government must remain neutral toward the content of the speech and apply regulations evenhandedly.

In *Adderly v. Florida*, 385 U.S. 39 (1966) (included in Cases for Students), the defendants were convicted of trespass after they refused to comply with a sheriff's order to leave an area outside the local jail where they were conducting a demonstration. The Supreme Court upheld the conviction, stating that the government was allowed to control the use of its property for lawful nondiscriminatory purposes. The Court noted that the defendants were not using a public forum but trespassed into an area not open to the public.

In *Greer v. Spock*, 424 U.S. 828 (1976), the Court ruled that political candidates, here a well-known minor-party advocate against the Vietnam War, were subject to evenly applied military regulations denying political candidates access to military bases since these areas were not considered public forums.

Another recurring issue is whether one who wishes to exercise his right of free expression has a right of access to private property which is open to the public. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the conviction of a Jehovah's Witness who distributed literature in a privately owned company town was overturned. The owners prohibited the distribution of any literature in the town. The company town was found to be very similar to a municipality, and thus the defendant has the same right to distribute literature in the company town as he would along a public street in a municipality.

Marsh was extended in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), which struck down a prohibition against peaceful labor picketing in a private shopping center. Justice Marshall's opinion argued that the shopping center was just like the business block of the company town in *Marsh*. Another decision limited the *Logan Valley* case. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court held that a shopping center could bar the distribution of anti-war leaflets. The Court distinguished *Logan Valley* on the ground that in this case the leafleting was unrelated to any activity within the center, and that the leafleteers had adequate alternative means of communicating their views. But in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that the First Amendment did not prevent a state from interpreting its own power under the state's constitution so as to permit individuals to exercise free speech and the right to petition on property of a privately owned shopping center.

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), Justice Stewart wrote for the majority in repudiating the rationale of *Logan Valley*. Justice Stewart stated that the *Logan Valley* rationale did not survive the *Lloyd* decision, and, therefore, warehouse employees of a company which operated a retail store in a privately owned shopping center had no First Amendment right to enter the shopping center for the purpose of advertising their strike against their employer. However, Justices Powell and White, in concurring opinions, held that *Logan Valley* could be distinguished from *Lloyd* and the present case on the basis that *Logan Valley* was limited to the situation of labor picketing a specific store for the purpose of conveying information with respect to the operation in the shopping center of *that particular store*. In short, if *Logan Valley* has not been expressly repudiated by the Court, it rests on a very tenuous foundation.

The distinction between regulating the content of expression and regulating the time, place, and manner of expression is sometimes difficult. There is always the danger that government authorities may use time, place, and manner regulations as an excuse to regulate the content of expression. This issue arose in *Feiner v. New York*, 340 U.S. 315 (1951) (included in Cases for Students). In speaking to a crowd of black and white people, Feiner urged black people to rise up in arms and fight for equal rights. A member of the crowd told police that if Feiner was not silenced, then he would silence him. After Feiner refused to discontinue his speech, the police arrested him and he was convicted of disorderly conduct. The Supreme Court upheld Feiner's conviction, finding that the police were attempting to prevent disorder. In a dissenting opinion, Justice Black argued that the Court was allowing police censorship of unpopular speakers.

The Court adopted a different approach in *Edwards v. South Carolina*, 372 U.S. 229 (1963). In this case, several black students picketed the state capitol protesting racial discrimination. A large, hostile crowd had gathered and made threatening remarks in demanding that the demonstration end. Nevertheless, the picketers continued their demonstration until the police intervened and arrested them for breach of the peace. The Court reversed the convictions of the demonstrators, distinguishing this case from *Feiner* by reasoning that since the demonstrators were lawfully exercising their First Amendment rights, they were entitled to carry out their demonstration without interference.

F. THE QUALITATIVE APPROACH: OBSCENITY, DEFAMATION, AND COMMERCIAL SPEECH

Looking to the quality and character of certain forms of expression, the Supreme Court has determined that certain classes of utterances are of such slight social value that their punishment raises no constitutional issue. Such forms of expression are "fighting words," *i.e.*, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace, "the lewd and obscene," *e.g.*, pornography, and "the libelous," *e.g.*, "Bill is a cheating and thieving scoundrel." But the Court has said that expressions involving the advertising of commercial or social interests are of value in modern society. This qualitative approach considering the social value of expression has led to distinctions between "protected" speech, *i.e.*, speech receiving full First Amendment protection, and "unprotected" speech, *i.e.*, speech receiving no protection.

1. Obscenity

Regulation of obscenity is premised on the protection of minors and preventing offensive matter from being displayed to those who do not wish to view it.

The Supreme Court has had difficulty in defining obscenity. However, the Court's definition of obscenity contains the following elements: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; *and* (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15 (1973). Potential problems occur in the application of this obscenity concept due to the nebulous meanings of "contemporary community standards," "appeals to the prurient interests," "patently offensive," and "serious literary, artistic, political or scientific value." Because of the vague character of such terms, problems arise concerning the chilling effect such characterizations can have on protected speech. Standards also may be elusive because they may vary from community to community.

Lesser restraints are sometimes permitted for material not obscene but declared by the Court to have "lesser value." In *Young v. American Mini Theatre, Inc.*, 427 U.S. 50 (1976), the Court utilized this approach in handling protected/unprotected speech problems. The Court upheld a zoning ordinance which restricted the location of new theatres showing non-obscene, but sexually explicit adult movies. The opinion upheld general government regulation of this non-obscene matter due to what some Justices noted to be its "lesser" value than other forms of protected speech.

Also, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court's decision upheld the Federal Communication Commission's power to regulate the content of radio broadcasts which the FCC found to be indecent but not obscene. This case involved a monologue of social satirist, George Carlin, discussing language which could not be used over the public airwaves. The radio station began the broadcast with a warning that some people might find the language sensitive. However, a person who was listening to the broadcast along with his fifteen-year-old son filed a complaint with the FCC concerning the broadcast. The Court's decision rested on the position that the content of media broadcasts was due less constitutional protection when indecent material was involved because the unique quality of the broadcast media allows for an intrusion into the individual's home and access by unsupervised children.

2. Defamation

Defamation is generally defined as a statement which injures the reputation of another person or holds them up to public ridicule; it is called libel when the statement is written and slander when spoken. The Supreme Court has included defamation within the categories of expression beyond constitutional protection. Nonetheless, since a distinction must be made between protected expression and what is allegedly libelous expression in defamation suits, constitutional issues arise in such suits.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court ruled that libel suits against public officials were barred except in cases where the libelous matter was intentionally false (actual malice) or the defendant was recklessly indifferent to its probable falsity. In later cases, the Court applied this standard to "public figures." The Court said that "public figures" are those who seek publicity or voluntarily place themselves in a position where publicity is expected. Is a society matron a "public figure?" Is the recipient of a government grant a "public figure?" No, according to the Court in *Time v. Firestone*, 424 U.S. 448 (1976) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

Recently the Court, in *Herbert v. Lando*, 441 U.S. 153 (1979), held that the plaintiff, a public figure who was subjected to criticism in a television news program, could inquire into the program editor's state of mind in order to prove "actual malice" in a defamation case. During the pretrial fact-gathering process by the plaintiff, the program editor had refused to answer questions about his conclusions, opinions, intentions, or conversations concerning people to be pursued for the broadcast and his reasons for inclusion and exclusion of certain materials from the broadcast. Although the Court held that no absolute privilege prohibited a defamation plaintiff from inquiring into the editorial process of a media defendant, it did hold that there must be a balancing between this inquiry and protection against any chilling effect on the publication of truthful information.

3. Commercial Speech

An emerging area of the law concerns whether the First Amendment protects commercial speech and advertising. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court found that speech uttered in a commercial context (a newspaper advertisement about the availability of out-of-state abortions) is afforded some First Amendment protection when the public interest in the speech outweighs the state's need for regulation. Further limits were placed on the commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which held that a purely commercial advertisement concerning the prices of medicine and drugs will receive some First Amendment protection. However, the Court ruled that certain parts of commercial speech were subject to regulation as to time, place, and manner, and as to fraudulent or deceptive advertising.

Finally, in *Bates v. State Bar*, 433 U.S. 350 (1977), the Court held that a state may not totally ban newspaper advertisements of prices for routine legal services. Employing the balancing test stated in *Virginia State Board*, the Court found that the free flow of commercial information outweighed any evils resulting from less regulation of advertisements concerning prices for routine legal services. It appears that the Court will entitle some forms of commercial expression First Amendment protection, and the Court will use a balancing test between the public interest in commercial or social information and the need for government regulation.

E. THE PRESS AND THE COURTS

The press has historically utilized the judicial process to protect and expand its First Amendment rights and, until the late 1970's, the press won most of these courtroom battles. Recently, however, the press in general has viewed recent court decisions with concern as the courts began defining the limits of press freedom, particularly where that freedom conflicted with other constitutional rights.

1. Prior Restraint

Prior restraint refers to actions by government officials to prohibit or restrain speech or publication by private citizens. Historically, prior restraint involved a system of licensing or requiring prior approval from an administrative official before a book, newspaper, or article was published. The Supreme Court has traditionally viewed prior restraint cases with a critical eye.

A celebrated case raising the prior restraint issue is the Pentagon Papers case, *New York Times Co. v. United States,* 403 U.S. 713 (1971). The New York Times and the Washington Post had received classified government documents on U.S. involvement in the Vietnam War from a former government employee. When the newspapers began publishing these documents, the federal government sought a court order to prevent further publication on the basis of national security interests. The Court ruled that the government had not carried its "heavy burden of proof" for the enforcement of a prior restraint.

As a general rule, once the press has the information it has the right to print or broadcast it, although this is not an absolute right. In *Landmark Communications v. Virginia,* 435 U.S. 829 (1978), the Supreme Court overturned a decision wherein a newspaper had been fined under a state statute for publishing confidential state proceedings. The newspaper had argued that it had not received its information by illegal means and that the information was accurate. Would it have made a difference if the newspaper had received the information illegally or if the information was inaccurate? Those questions were left unanswered by the Court.

Although the Court continues to disallow prior restraints once the press has the information, it approaches freedom of the press issues differently in situations involving obtaining the information and access to the information.

2. Access to Information

Are there limitations on the freedom of the press to gather and disseminate information to the public? Does the First Amendment grant the press more rights than the public so that the press may inform the public? Although many press advocates argue that the First Amendment implicitly affords both the public and the press the right of access to government-controlled information, the Supreme Court has not squarely decided this issue. The Court has held in a series of cases that the media have no special right of access beyond that of the general public in the case of access to prisons or prison inmates. *Houchins v. KOED,* 438 U.S. 1 (1978).

In *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978), the Court ruled that the Fourth Amendment, as applied to third persons, and the Fourth Amendment as applied to the press, does not prohibit searches of press premises for evidence of a crime. The Court refused to carve out a special privilege for the press under the First Amendment exempting it from reasonable searches. However, the Court did imply that First Amendment considerations should be weighed in determining whether the search is reasonable.

Similarly, the contention that the First Amendment grants to newsmen a broad privilege to refuse to disclose their sources was rejected by the Supreme Court in *Branzburg v. Hayes,* 408 U.S. 665 (1972). Newsmen have invoked the First Amendment, claiming a right not to disclose confidential sources. The argument has been that, without the credible promise of confidentiality, news sources would dry up, and that without the ability to gather information, freedom of the press would be a hollow right. Among the Court's arguments for rejecting the privilege was that the suggested constitutional privilege should not be absolute. The reporter could be compelled to testify in cases where the state had a compelling need for the information. Thus, sources could not know whether their confidence would be kept. They also emphasized the difficulty of defining the limits and exceptions to the privilege.

Debate in Congress over the scope of a proposed federal statutory newsman's privilege has emphasized the dilemma highlighted by the Court's *Branzburg* opinion. Would a flat, unqualified newsman's privilege deny the government access to vitally needed information? On the other hand, would a qualified privilege be so unpredictable that the newsman's source could not know in advance whether the privilege would be respected?

3. Free Press v. Fair Trial

How are First Amendment rights balanced against other constitutional rights when they come in conflict? Can direct restraints be placed on the press to preclude comment on a pending criminal trial which would interfere with the defendant's right to a fair trial? The Court has set aside convictions because of prejudicial pretrial publicity. *Irvin v. Dowd,* 366 U.S. 717 (1961). Does one constitutional right have priority over another?

In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), the Court declined to give precedence to either right by stating, "The authors of the Bill of Rights did not undertake to assign priorities as between the First Amendment and Sixth Amendment rights . . . [I]t is not for us to rewrite the Constitution by undertaking what they declined to do." However, the Court also stated that, "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The Court in *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368 (1979) (included in Cases for Students), did define limits on press and public access to information, particularly in criminal proceedings concerning the defendant's right to a fair trial and concluded that the defendant's right to a fair trial outweighed the rights of the public and the press. The Court noted that the Sixth Amendment guarantee of a public trial was for the benefit of a defendant alone and not for the public or press. The very next year, however, the Court held, in *Richmond Newspapers Inc., v. Virginia,* 100 S.Ct. 2814 (1980), that, absent an overriding interest, the trial of a criminal case must be open to the public. Chief Justice Burger wrote the opinion holding that the First Amendment guaranteed the right of the public and the press to attend criminal trials. The *Gannett* case was distinguished as applying to the pretrial situation only.

Does the Court's distinction between pretrial and during-trial access give priority to one constitutional right over another? Are pretrial court hearings as much a part of a criminal trial as the actual trial itself? In protecting a defendant's right to a fair trial by limiting potential jurors from possible prejudicial pretrial publicity has the Court balanced the scales in favor of the defendant's individual rights over the public's general rights?

H. CONCLUSION

Whether we look at the consequences or the quality of certain forms of expression, the courts provide vigorous protection for the right of free expression. Even though this right is not absolute, it is fundamental to the preservation of a democratic society. The courts remain ready to safeguard this important right even when the message is unpopular, critical of the status quo, or lacking in social merit. The task of the courts continues to be the careful scrutiny of limitations and restrictions on free expression.

4. Equal Protection

Cases for Students

A. State Action
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)
Is the state licensing of a private club a state action under the Equal Protection Clause?

B. Wealth and Education
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)
Does the Texas system of financing public education illegally discriminate on the basis of wealth or illegally interfere with a fundamental right under the Constitution?

C. Sex Discrimination and the Draft
Rostker v. Goldberg, 448 U.S. 1306 (1980)
Is it unconstitutional sex discrimination to require men to register for the draft but not women?

D. Fundamental Rights
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)
Is a municipal ordinance that prohibits all picketing near public schools except labor picketing violative of the Equal Protection Clause?

E. Affirmative Action
Regents of University of California v. Bakke, 438 U.S. 265 (1978)
Does a medical school special admission program which sets aside 16 of 100 positions to increase representation of minority students violate the Equal Protection Clause or Title VI of the 1964 Civil Rights Act?

Summary of the Law For Lawyers and Teachers

A. Introduction
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  1. Private Performance of Public Functions
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E. Conclusion

4. Equal Protection

Cases for Students

A. STATE ACTION: *Moose Lodge No. 107 v. Irvis* (1972)

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Facts

Moose Lodge No. 107 was a private club in Harrisburg, Pennsylvania, which owned its own building. The lodge was licensed by the state of Pennsylvania to sell liquor which was controlled by the State Liquor Control Board. Liquor was sold only in bottles by state stores or by the drink in hotels, restaurants, and private clubs. In Harrisburg, there were 115 places licensed to sell liquor and no more licenses could be obtained due to the limitation set by the Liquor Control Board.

According to state law, private clubs with liquor licenses had to abide by their constitutions and bylaws in order to keep their licenses. The Moose Lodge Constitution stated, "The membership of the lodge shall be composed of male persons of the Caucasian or White race above the age of 21 years, and not married to someone other than the Cauasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being."

On Sunday, December 29, 1968, K. Leroy Irvis, majority leader of the Pennsylvania House of Representatives, was the guest of a member of the Harrisburg Moose Lodge. Irvis was refused service at the lodge solely because he was black.

Issues for Discussion

1. Should private clubs be able to select the kind of people they allow into their clubs as members or guests? Why?
2. Was the State of Pennsylvania participating or aiding Moose Lodge in its racially discriminatory practices? Why?
3. Suppose a public school club had a membership policy "for Whites only." Should the club be allowed to use school classrooms for meetings after school? Should the club be allowed to use the school bulletin board to publicize club activities? Should the club be allowed booth space in the school auditorium on "Club Day" at the school? Where would you draw the line between private discrimination and state discrimination?

Decision of the United States Supreme Court

The state licensing of a private club does not significantly involve the state in the discriminatory practices of the club in order to establish a violation of the Equal Protection Clause.

Reasoning of the Court

The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause applies to state actions only; that is, a state must in some way be involved in the denial of equal protection.

Justice Rehnquist stated in the opinion for the majority that discrimination by private bodies does not violate the Equal Protection Clause unless the state is significantly involved with the discrimination. He found no significant involvement by the state of Pennsylvania in the discriminatory practices of the private lodge. He stated that the mere licensing of the private lodge for the purpose of selling alcoholic beverages in no way involved the state in fostering or encouraging racial discrimination because the State Liquor Control Board played no part in establishing the club's guest policies nor was it a "joint partner" in the racial discrimination.

Justices Douglas, Marshall, and Brennan dissented, finding that since the availability of liquor licenses was restricted by the state, the ability of black people to obtain liquor was being restricted by the state. Therefore, there was sufficient state action in the pattern of regulations used by the state to control the sale of liquor.

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B. WEALTH AND EDUCATION: *San Antonio Independent School District v. Rodriguez* (1973)

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Facts

Public schools in Texas were funded by local property taxes and grants from the state and federal governments. To obtain local funds for education, each school district imposed a tax on property owned within its district. Thus funding for the schools in each district was dependent on the amount of money derived from the district property tax.

Some Mexican-American parents with children in the Edgewood school district, an urban district in San Antonio, Texas, sued school officials, claiming that this system of financing public schools was unconstitutional under the Equal Protection Clause. In the suit, the Edgewood district, the least wealthy district in the San Antonio area, was compared to the Alamo Heights district, the most affluent school district in the area. Edgewood was located in the inner city in a neighborhood with little commercial or industrial property; 90% of the students were Mexican-American, and 6% were black; the average property value per pupil was $5,960, and the median family income was $4,686. The tax rate was $1.05 per $100 of property, and the district spent $356 per pupil.

Alamo Heights was a prosperous, residential community. The schools were mostly white with only 18% of the students being Mexican-American and 6% being black. The average property value per pupil was over $49,000 and the median family income was $8,001. The tax rate was $.85 per $100 of property and the district spent $594 per pupil. Because Alamo Heights had more expensive property, more money was available for its schools at a lower tax rate than in Edgewood.

A federal district court ruled that the Texas system of financing public schools denied plaintiffs the equal protection of the laws, and the Texas school authorities appealed to the United States Supreme Court.

Issues for Discussion

1. Does the Texas system of financing public education discriminate on the basis of wealth? Who, if anybody, does it discriminate against? Everyone, including any rich people, in the Edgewood school district?
2. Does the Constitution imply that there is a right to public education? At what level, if any, should such a right apply? Elementary? High school? College?
3. Is the Texas system of financing public education a reasonable method of giving localities substantial control over their own schools? Why or why not? How could the system be improved to guarantee both local control and equal opportunity? Should such improvements be the responsibility of the state legislature or the courts?
4. In what ways, if any, does a child's education depend upon the amount of money spent on his or her school?

Decision of the United States Supreme Court

The Texas system of financing public education does not discriminate against any definable class of people on the basis of wealth and, therefore, is not subject to strict judicial scrutiny. Furthermore, the system does not interfere with any fundamental right which is subject to strict scrutiny since education is not a right protected under the Constitution. The system has a rational relationship to the legitimate state purpose of local control in the field of education and therefore does not violate the Equal Protection Clause.

Reasoning of the Court

This case demonstrates how the courts analyze equal protection problems. When the courts analyze an equal protection problem involving different treatment because of a "suspect" classification (classifications according to race, national origin, religion, or alienage) or different treatment interfering with the exercise of a "fundamental" right (the right to vote, right to travel, right to privacy, free expression), a stricter test is imposed to justify the state action known as the strict judicial scrutiny test. When the equal protection problem involves any other classification by a state (for example, income classifications in public welfare regulations) the classification is judged according to a test of reasonableness—the rationality test. Suspect classifications are analyzed closely because of the possibility of discriminatory treatment. Classifications involving fundamental rights are also analyzed closely because such rights have a constitutional basis. However, courts only look for a reasonable basis for other classifications made by states.

Justice Powell wrote the opinion for the majority in this case. He rejected the arguments that claimed there was an identifiable class or people in this case who were discriminated against on the basis of wealth. The Justice found that there was no evidence showing that all people in the poorer-property districts were poor themselves. He also stated that there was no absolute deprivation of education to the people in the poorer-property districts. He concluded by indicating that discrimination on the basis of wealth alone was not a "suspect" classification because the economically disadvantaged were not treated unequally, historically, nor were they politically powerless against the majority of citizens.

Justice Powell admitted the importance of education, but found that the right to education was not guaranteed by the Constitution. For this reason, he held that the right to education was not a "fundamental" right and, therefore, the strict judicial scrutiny test was also inapplicable here.

What was applicable was the rationality test. Justice Powell held that the system of financing public education had a rational relationship to the state's purpose of providing basic education to each child while maintaining local control over the schools. He found that the system preserved local control over the schools by allowing school districts to determine the amount of taxes to fund their schools.

Justice Marshall wrote a dissenting opinion arguing that "careful judicial scrutiny" should be applied in this case based on the importance of the interest affected—education—and the discriminatory qualities of the classification—wealth. He would have found that the right to education was a "fundamental" right because of its close connection to the exercise of constitutionally protected rights, such as the right of free expression and the right to vote. Based on this important interest of education, the Justice applied "careful judicial scrutiny" in finding that the Texas system illegally discriminated on the basis of group wealth.

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C. SEX DISCRIMINATION AND THE DRAFT: *Rostker v. Goldberg* (1981)

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Facts

On January 23, 1980, after the Soviet Union invaded Afghanistan, President Carter ordered draft registration for military service. Pursuant to Congress' constitutional power "to raise and support Armies," federal law authorized the President to require draft registration for "every male citizen" between the ages of 18 and 26. The President recommended that both men and women be required to register for the draft, but Congress overruled the recommendation by passing a resolution requiring only men between ages 18 to 21 to register.

Several men subject to the draft argued that it was unconstitutional sex discrimination to require men, and not women, to register. The district court held that the draft law was unconstitutional sex discrimination. The Selective Service System, the federal agency responsible for administering the draft, appealed to the United States Supreme Court.

Issues for Discussion

1. Is it unfair to require only men to register for the draft? To be drafted? To fight in combat?

2. Should men and women have the same obligation to serve their country? Why?

3. Can a law that treats men and women differently be reasonable? Can it also be fair and just? Under what circumstances, if any, should such a law be upheld by the courts? When should it be declared unconstitutional?

Decision of the United States Supreme Court

Congress acted within its constitutional authority in authorizing draft registration of men, and not women. Thus the district court decision was reversed.

NOTES:

Reasoning of the Court

The Court held that Congress was entitled to broad authority when it considered matters regarding the national defense and military affairs. The Court felt that Congress was the appropriate branch of government to deal with these matters because the Constitution conferred this authority to Congress "to raise and support Armies" and "provide and maintain a Navy." The Court said it was not as qualified as Congress to judge military matters which Congress had the machinery to investigate and examine.

The Court noted that Congress had thoroughly considered the issue of draft registration for women and that federal law and military policy generally excluded women from combat. Therefore, the Court said that Congress was entitled to treat women differently from men for purposes of draft registration, since the purpose of registration was to prepare for a draft of combat troops.

Justice Marshall dissented along with Justices Brennan and White. In Justice Marshall's opinion, the draft laws excluded women from a "fundamental civic obligation," military service to protect the national defense. Justice Marshall would have an equal protection analysis finding that the different treatment of men and women on the basis of sex was not substantially related to the achievement of the important governmental objective of maintaining a military force. He found that the registration of women would not detract from the draft, since the military did not need combat troops only but other vital services which women could provide.

D. FUNDAMENTAL RIGHTS: *Police Department of Chicago v. Mosley* (1972)

NOTES:

Facts

For some seven months, Earl Mosley, a federal postal employee, conducted a peaceful and quiet picket in front of Jones High School in Chicago. During school hours Mosley would walk along the public sidewalk carrying a sign which stated, "Jones High School practices black discrimination. Jones High School has a black quota."

Thereafter, a municipal ordinance was enacted in Chicago in March, 1968 declaring,

> "A person commits disorderly conduct when he knowingly . . . (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . ."

The ordinance was to become effective on April 5. In the meantime, Mosley called the Chicago Police Department to find out how the ordinance would affect his picketing, and he was told that he would be arrested if his picketing continued. On April 4, Mosley stopped his picket. Later, he challenged the constitutionality of the ordinance in a suit against the Chicago Police Department.

Issues for Discussion

1. What equal protection problem is created by the ordinance?

2. Does it affect any important rights derived from the Constitution? Which rights?

2. What rights derived from the Constitution are entitled to equal protection by the states? The right of free expression? The right to vote? Are there rights not mentioned in the Constitution that are entitled to equal protection by the states? The right of privacy? The right to travel? The right to education?

Decision of the United States Supreme Court

A municipal ordinance that treats some picketing differently from others creates an impermissible distinction affecting the fundamental right of free expression thereby violating the Equal Protection Clause.

NOTES:

Reasoning of the Court

Because the ordinance excluded labor picketing from the prohibition on picketing near schools, the Court held that it made a classification affecting the fundamental right of free expression guaranteed by the First Amendment. By creating an exception for labor picketing, the Court found that the ordinance was treating some picketing differently from others because of the content of the message on the picket sign. (For example, the ordinance would allow a picket sign stating, "Jones High School is unfair to labor," but would prohibit a picket sign stating, "Jones High School is unfair to black people.") The Court rejected the claim that the city was serving a substantial governmental interest by attempting to prevent disruption at its schools. The Court noted that there was no showing that peaceful labor picketing was any different than peaceful nonlabor picketing nor that nonlabor picketing was more disruptive than labor picketing. The Court emphasized that it was the discrimination based on the content of the picket that was prohibited by the Equal Protection Clause.

E. AFFIRMATIVE ACTION: *Regents of the University of California v. Bakke* (1978)

Facts

In 1968, the University of California at Davis Medical School opened with an entering class of 50 students (increased to 100 students in 1971), of which 3 students were Asian, but no students were black, Mexican-American, or Native American. The next year, the school started a special admission program to increase representation of disadvantaged students in the medical school.

In 1973, candidates for the special admission program indicated whether they were "economically and/or educationally disadvantaged" or members of a "minority group," which according to the special admission committee were blacks, Mexican-Americans, Asians, and Native Americans. In 1974, the only categorization used was member of a "minority group."

Candidates for the special admission program were judged by a special admission committee. Candidates for general admission were judged by the school's regular admission committee. Both committees judged candidates by looking at their scores on medical school entrance examination and grades in college. However, candidates for general admission had to have at least a "C+" grade average from college to be considered for admission. Candidates for the special admission program were considered for admission even if they had below a "C+" average. Sixteen positions out of 100 were set aside for special admission. From 1971-1974, 63 minority students (but no white applicants) were admitted through special admission, and 44 minority students were admitted through general admission.

Bakke, a white, male applicant, applied twice in 1973 and 1974 for general admission into the school but was rejected under the general admission program. In both years Bakke was rejected, applicants under the special admission program had lower grade point averages and lower medical school entrance test scores.

Bakke sued the University, arguing that the special admission program operated to exclude him on the basis of race in violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act, which prohibited the exclusion of any person on the ground of race, color, or national origin from participation in a program receiving federal financial aid.

Issues for Discussion

1. Is there any relationship between high grades and high test scores and being a good medical school student and a good doctor?

2. What reasons, if any, justify a medical school's admission practice of giving special consideration to an applicant's ethnic background? An applicant's sex? An applicant's economic background? If such a consideration was used, what benefits might be gained by the school? By the medical profession? By society?

3. If minorities and women are underrepresented in medical schools and the medical profession because of past racial and sexual discrimination, could their representation be increased in this field without racial or sexual classifications? If such classifications are used to increase minority and female representation, should such classifications be judged in the same manner as a law which prohibits black people from using the same public restrooms as white people? Why?

4. Suppose you were an admission officer at the Davis medical school and assigned the job of increasing the representation of qualified "disadvantaged" and "minority" students at the school. Would you use a method like the Davis special admission program? If so, what changes or improvements would you make? How would you define "disadvantaged applicant" and "minority applicant?" Can you avoid the use of racial classifications in your job?

NOTES:

Decision of the United States Supreme Court

NOTES:

The Davis special admission program is unlawful under Title VI of the 1964 Civil Rights Act and the Equal Protection Clause. However, the race of an applicant can be considered in the school's admission process.

Reasoning of the Court

In an unusual grouping of many separate opinions by the justices of the Court, it was Justice Powell's opinion which represented the final decision. Justice Powell sided with four other justices (Stevens, Burger, Stewart, and Rehnquist) in holding the Davis special admission program was illegal and that Bakke was entitled to admission to the school. He then sided with the other four justices (Brennan, White, Marshall, and Blackmun) in holding that the race of an application could be considered in the school's admission process.

Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger believed that the Davis special admission program violated Title VI of the 1964 Civil Rights Act because Bakke was excluded from participation in the Davis special admission program simply on the ground of his race.

Justice Powell believed the constitutional issue of equal protection had to be addressed since Title VI followed the constitutional standard of equal protection. He found that the Davis special admission program involved classifications based on race and, therefore, was subject to strict judicial scrutiny. Thus the next issue for the Justice was whether a compelling state interest justified the use of the racial classifications. He found that there was a compelling state interest for the school in attaining a diverse student body, which would encourage a wide-ranging exchange of ideas in the school. However, Justice Powell believed that the Davis special program impermissibly violated the rights of Bakke and that the program was not the least restrictive method to attain diversity. Because the Davis program only looked at the race of an applicant in attaining diversity, Justice Powell looked at other alternatives that considered the race of an applicant along with other factors such as unique talents, leadership potential, and ability to communicate with the poor. Thus, he spoke approvingly of programs that considered the race of an applicant as one factor among many others.

Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell that the race of an applicant could be taken into account in the university admission process. These justices wanted to make it clear that affirmative action programs using racial standards were approved of by at least a majority of the Court. Justice Brennan, writing this opinion concurred in by the other three justices, also would have approved of the Davis special admission program as a method of serving the important goal of correcting past racial discrimination in the American society. He argued that setting aside a certain number of seats for qualified minority applicants was no different from allowing the race of an applicant to be considered in admission decisions where race was given special consideration.

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment states,

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

This constitutional provision mandates the equal treatment by the states of one citizen in relation to another citizen. The clause applies to the states only. Consequently, a case involving equal protection requires some form of state action. The federal government is prohibited from denying equal protection to citizens under the concept of due process in the Fifth Amendment.

Once state action is shown, the analysis of equal protection problems moves to the type of review to be given the various issues. The traditional review of different treatment by state governments involved a minimal scrutiny standard—the rational basis test. If the different treatment by the state had a rational basis, then such state action was valid. Later, the analysis included a higher level of review—the strict scrutiny standard. Here, when discriminating treatment by the state was deemed suspect or when it affected fundamental rights, courts required compelling justification by the state in order to be held valid. Although the analysis is not as rigidly applied as it is sometimes made out to be, the courts attempt to adhere to its broad framework to resolve equal protection issues. Since the concept of equal protection itself demands a balancing of competing interests, this area of the law often involves the most problematic yet fascinating issues. The repercussions from the judicial resolution of these issues frequently create major social policy shifts throughout society.

B. THE STATE ACTION REQUIREMENT

State action is clearly involved in a case arising from a state statute, local ordinance (since cities and towns are created by the states), or actions of state government officials or agencies. Furthermore, state action is found in three other instances—cases involving private performance of public functions, cases where there is significant state involvement in private activities, and cases involving state enforcement or encouragement of private discrimination. Here, arguably, private conduct is subjected to equal protection scrutiny because the state in some way aided and abetted private discrimination. Although the connection between different treatment and state action is more strained in these instances, the courts have nevertheless held that they involve the necessary state action.

1. Private Performance of Public Functions

In *Nixón v. Condon,* 286 U.S. 73 (1932), the Supreme Court ruled that state practices by a private political party denying black people eligibility to vote in political party primaries were unconstitutional. In *Condon,* the Democratic Party of Texas adopted a resolution pursuant to a state statute which allowed the party's executive committee to determine the membership rules for the party. The resolution excluded black people from participation in the party primary. The Court found this practice to be a state action under the Fourteenth Amendment because the political party was not acting in matters of merely private concerns but in matters of high public interest.

In another case, *Evans v. Newton,* 382 U.S. 296 (1966), the Court found state action in the private operation of a public park once maintained by the local government. A local resident gave the city of Macon, Georgia, a piece of land for use as a park for white people only. The city had been trustee of the park but was later replaced by private trustees. The Court found state action based on the facts that the city managed and maintained the park.

2. Significant State Involvement in Private Activities

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the owners of a private restaurant admitted that they refused to serve black patrons. The restaurant was located in a parking facility owned and operated by the Wilmington Parking Authority, a state agency in Delaware. The agency leased the restaurant facilities to these private parties. The Supreme Court found sufficient state action constituting a denial of equal protection because the state was involved in the private discriminatory conduct to a "significant extent." Significant state involvement was found based on the facts that the restaurant was an integral part of the publicly owned building, and mutual benefits were conferred to each in the form of added business for the parking facility and convenient parking for the restaurant's patrons. Thus the state became a "joint participant" in the private discriminatory conduct.

However, the Court found no state action in a case involving a private lodge licensed to serve alcoholic beverages by a state liquor control agency. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (included in Cases for Students). A black guest of a member of the lodge was refused service at the lodge, and the guest challenged this practice, claiming the licensing of the lodge by the state constituted state action under the Equal Protection Clause. The Court first noted that the distinction between a private action and a state action would become nonexistent under the Equal Protection Clause if every private entity was subject to it because the entity received any benefit or service from the state. The Court then distinguished this case from *Burton,* finding no lessor-lessee relationship nor public setting here. The Court stated that there was no joint venture here between the state and the lodge which was, therefore, involved in purely private conduct.

3. State Enforcement or Encouragement of Private Discrimination

Prohibitive actions under the Equal Protection Clause also includes state enforcement or encouragement of private racial discrimination. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), neighborhood property owners entered into an agreement providing that occupancy of their separately owned property would be restricted to white people only. A state supreme court ordered a state trial court to enforce the agreement against a white resident of the neighborhood who sold his property to a black person. The court reasoned that the racially restrictive covenant was a private agreement not subject to the mandate of equal protection. Although the United States Supreme Court agreed that the covenant by itself would not violate the Equal Protection Clause because it involved private conduct only, it held that state judicial enforcement of such agreements involved state action prohibited by the Equal Protection Clause.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court struck down a state law that gave private citizens the right not to sell or lease property to whomever they chose. The law was adopted in response to several recently enacted state fair housing laws. The United States Supreme Court followed the reasoning of the California Supreme Court which also held the state law invalid. The California court had looked to the intent of the state law, noting that it was an attempt to overturn state anti-discrimination laws and establish a state constitutional right to privately discriminate. The California court, with the United States Supreme Court agreeing, emphasized that adoption of the state law would put the state in a position of encouraging private discrimination. Such encouragement of private discriminatory conduct was held to be state action and thus prohibited under the Equal Protection Clause.

C. LOW-LEVEL SCRUTINY—THE RATIONAL BASIS STANDARD

Equal protection requires that states maintain an equality in their actions regarding a variety of affairs. Following the adoption of the Fourteenth Amendment, the courts recognized that the various issues involved in classifications affecting economic and social affairs could not be resolved in the same manner as the difficult issues involving racial classifications. In regulating economic and social affairs, the courts felt that the states were entitled to more deference in managing such activities. Therefore, in this sphere of governmental activity, state actions were entitled to an underlying presumption of legitimacy. From this background, the courts developed a minimal scrutiny standard of review based on a notion of rationality. Primarily regarding economic and social affairs, the rational basis standard stipulated that classifications made by the states had to be rational and further a proper governmental purpose.

The first case to apply the rational basis standard in striking down arbitrary classifications made by state legislation was *Gulf, Colo. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897). Here, a state statute singularly allowed for the recovery of attorney fees in successful suits against railroad companies. A railroad company, which lost a suit and was ordered to pay attorney fees, challenged the legislation. The Supreme Court, noting that corporations are considered "persons" in law, held that classifications made by state legislatures could not be arbitrary but must be based upon "some reasonable ground—some difference which bears a just and proper relation to the attempted classification." The Court thus overturned the state statute holding that there was no rational basis for singularly penalizing railroad companies regarding the recovery of attorney fees.

Although *Gulf* applied the rational basis standard to overturn state legislation, most cases decided under the standard upheld the constitutionality of the legislation challenged on equal protection grounds. A good example of this trend was in *Lindsley v. Natural Carbonic Gas*, 220 U.S. 61 (1911), which upheld a state statute prohibiting the pumping of water containing carbonic gas from wells drilled in rock but allowed the pumping of water from other wells. The Court's opinion laid out the rational basis test, stating (1) the exercise of a state's police power was subject to wide discretion and only prohibited when the state action had no reasonable basis and was purely arbitrary, (2) the rational basis standard did not demand equality made with "mathematical nicety," (3) the burden of showing irrationality was on the party challenging the state action.

In modern times, another area where the rational basis standard has been applied is in the economic regulation of public welfare programs, In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the appellees challenged the constitutionality of a section of the Food Stamp Act which excluded from participation any household containing an individual who is unrelated to any other member of the household. The appellees argued that this section created an unreasonable classification between households of related persons and households containing one or more unrelated persons. The government argued that the section was intended to make "hippy" communes ineligible for assistance and to prevent fraud in the program. The Court first found that there could be no legitimate governmental purpose in singling out a socially unorthodox group for unequal treatment under the Act. The Court then said that the denial of assistance to otherwise eligible households containing unrelated members did not "constitute a rational effort" to prevent fraud in the program because in practical operation the exclusion would affect only those persons "who are so desperately in need of aid that they cannot even afford to alter living arrangements so as to retain their eligibility." Although the Court here expressly applied the rational basis standard to the equal protection issues presented, it appears that the standard contains sufficient flexibility to supply the courts with authority to accept or reject statutory classifications based on a broad notion of rationality. In sum, to uphold a law or regulation under the rational basis standard, the state merely has to show some reasonable basis for the classification that will accomplish a legitimate government purpose.

D. HIGH-LEVEL SCRUTINY—THE STRICT-SCRUTINY STANDARD

As the equal protection analysis developed, certain classifications made by the states were subjected to a higher form of scrutiny by the courts. This strict scrutiny standard was applied to these classifications because they inherently undermined equal protection. The courts employed this standard where the state action involved a "suspect classification" or a classification affecting a "fundamental right." Such an action would only be valid if it was necessary to promote a "compelling" state interest and it was the least burdensome alternative available to advance that interest. As with the rational basis standard, rigid application of the strict scrutiny standard has not been possible because of the intricate nature of the issues involved.

1. Suspect Classifications

Classifications involving race, alien status, national origin, and religion have generally been treated as "suspect," thereby requiring the strict scrutiny standard of review. Variations in the application of the strict scrutiny standard to these classifications can be observed in Supreme Court decisions discussed below, particularly regarding race and alien status.

a. Race

(1) Racial Discrimination in General

Because of the continuous problem of racial discrimination in American society after the end of slavery, many equal protection cases deal with state policies that discriminate against black people. *Strauder v. West Virginia,* 100 U.S. 303 (1879), was the first Supreme Court case to hold that the Equal Protection Clause was violated by a state law that discriminated on the basis of race. Here, the state statute provided that only "white male persons" would be assigned jury service. In a constitutional challenge to the statute, the Court said that the law amounted to a denial of equal protection to black people. The case of *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), involving the discriminatory administration of state laws against Chinese people, made it clear that the Equal Protection Clause protected all races of people.

In spite of these initial decisions, the Supreme Court in 1896 created the "separate but equal" doctrine authorizing racial segregation in *Plessy v. Ferguson,* 163 U.S. 537 (1896). In this case, a Louisiana statute required all railroads to provide "separate but equal" accommodations for white and black passengers and imposed a criminal penalty on any passenger insisting on accommodations in the area of the other race. The Court upheld the statute stating that the Equal Protection Clause was not intended to abolish all racial "distinctions" nor enforce "social" as opposed to political equality. Thus racial segregation had the force of law for almost sixty years until the Supreme Court decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), infra, struck down the "separate but equal" doctrine.

In *Loving v. Virginia,* 388 U.S. 1 (1967), a case involving an equal protection challenge to a state law prohibiting interracial marriages, the Court discussed the modern adaptation of the strict scrutiny standard. The Court found racial classifications to be inherently suspect and, therefore, subject to the "most rigid scrutiny." The Court said that if the racial classification was not necessary to the accomplishment of some permissible state interest independent of a racially discriminatory purpose, then it was invalid.

In *Washington v. Davis,* 426 U.S. 229 (1976), plaintiffs claimed that an entrance test for a police training program had a racially discriminatory impact. However, the Court said a showing that the state action (the entrance test administered by the state) adversely affected members of one race more than others would not be sufficient to prove a violation of the Equal Protection Clause. To violate the Constitution, the Court held that the plaintiffs must show that the state *intended* to discriminate.

(2) School Desegregation

The first area of attack against racial discrimination was education. In *Brown, supra,* the Supreme Court invalidated state-imposed racial discrimination in public schools. Noting the importance of education and the detrimental effects racial segregation had on black children, the Court said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." In *Brown v. Board of Education* (Brown II), 349 U.S. 294 (1955), the Court left the task of desegregation of public schools to the lower federal courts. Because of the resistance to desegregation, the process was slow and to this day remains a source of controversy.

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the Supreme Court again entered the process to press for speedier desegregation of "dual" school systems. These school systems were primarily located in the South where state-imposed desegregation created many one-race schools. The Court held that in these "dual" school systems the racial composition of the schools could be taken into account in determining the remedy for desegregation. The Court also ruled that bus transportation and the assignment of students on the basis of their race could be utilized to desegregate these school systems.

In the North and the West, most states had not mandated segregated "dual" school systems as a policy. Nevertheless, as a result of "unofficial" local policies and residential patterns, segregated schools existed in many areas. Most current school desegregation cases involve school systems of this type. In *Keyes v. School District No. 1,* 413 U.S. 189 (1973), the Supreme Court stated that under the Equal Protection Clause a complainant would have to prove that segregation in the schools was the result of the intentional acts of the school authorities, but such a showing of intentional segregation in a substantial portion of the schools would support a presumption that the school district was operating a "dual" system as in *Swann.* Another problem in desegregating these schools was the entrenchment of segregation caused by "white flight"—residential movement of white people to suburban school systems creating more and more predominantly black urban schools. In *Milliken v. Bradley,* 418 U.S. 717 (1974), a federal district judge found that school authorities in Detroit, Michigan, maintained a policy of segregation in the schools. Because the Detroit school system was overwhelmingly black, the judge ordered a desegregation plan involving several suburban school districts.

The Supreme Court held that the federal district court could not order such a plan unless it was shown that the racially discriminatory acts of the state or suburban school districts had been a substantial cause of the interdistrict segregation.

Other recent Supreme Court cases have discussed remedies to desegregate the schools. In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Court said that lower court desegregation orders cannot require the annual adjustments of the racial mixture of public school student populations. Two recent cases, *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) and *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), held that systemwide relief in a school district was appropriate if the district's school board deliberately segregated a substantial portion of the school district in the past because a presumption would be made that the current segregation of the schools resulted from past school board policies.

b. Alien Status

As with race, the courts have held that alien status is a suspect classification subject to the strict scrutiny standard of review. In *Sugarman v. Dougall*, 413 U.S. 634 (1973), a state law excluded all aliens from competitive civil service employment. The Supreme Court stated that under the strict scrutiny standard, classifications based on alien status were permissible only if necessary to achieve a substantial interest and must be narrowly confined to the achievement of that interest. Here, the Court said that the state law could not withstand this scrutiny because the law was too broad in application and unsupportable by any substantial state interest. However, the Court qualified its ruling stating that certain appropriately defined positions within the state civil service could be limited to a qualification of citizenship. The Court relied on this qualification in *Foley v. Connelie*, 435 U.S. 291 (1978), to uphold a state statute that excluded aliens from becoming state police officers. The Court reasoned that the state had a legitimate interest in limiting this employment because the officers directly participated in the execution of public policy.

Even though the courts have treated alien status as a suspect classification like race, it appears that the substantiality of the states' interests regarding classifications based on alien status can be found in instances where similar reasoning would be unacceptable regarding racial classifications.

2. Partially Suspect Classifications

Because of vacillation in many court decisions, some classifications must be categorized as partially suspect classifications, sometimes subject to high-level scrutiny or sometimes subject to a lower level scrutiny. Such classifications are sex, legitimacy, and wealth.

a. Sex

The court decisions involving classifications based on sex indicate the difficulties the courts have had in applying a strict scrutiny, rational basis, or other standard of review to these classifications. In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court invalidated a state statute which provided that when two individuals were otherwise equally entitled to appointment as administrator of an estate, the male applicant was to be preferred to the female. The Court seemingly applied the rational basis standard here stating that this classification based on sex had to be reasonable and not arbitrary and must have a "fair and substantial relation to the object of the legislation." Although the standard applied here was not the traditional formulation of the rationality test (since it called for a substantial rather than rational relationship between the classification and the governmental objective), the Court nevertheless said it was applying a rationality test.

The Court's decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973), aroused more confusion. This case involved a federal statute which allowed a male member of the armed forces to claim his wife as a dependent whether or not the wife was dependent on the husband for support, but allowed a female member to claim her husband as a dependent only if he in fact was dependent on her for more than half of his support. Justice Brennan wrote the plurality opinion, in which three of the justices concurred, stating that "classifications based upon sex, like classifications based on race, alienage, or national origin are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Justice Brennan found that the classification, being "inherently suspect" could not be justified by the government on the basis of "administrative convenience" under the strict scrutiny standard. In a concurring opinion by Justice Powell, joined by two other justices, he objected to the use of the strict scrutiny standard, noting that sex was not a suspect classification. He argued that the rationality test of *Reed* invalidated the statute here and found no support for the view that sex was a suspect classification.

Since a majority of the justices would not agree that sex was a suspect classification entitled to strict scrutiny, Justice Brennan in *Craig v. Boren*, 429 U.S. 190 (1976), urged the Court to adopt an intermediate standard applicable to classifications based on sex. *Craig* involved a state statute which prohibited the sale of 3.2% beer to males under age 21 and to females under age 18. A male challenged the constitutionality of the law, claiming it constituted a denial of the equal protection to males 18-21 years of age. In another plurality opinion by Justice Brennan, he argued that classifications based on sex were "subject to scrutiny [but not strict scrutiny] under the Equal Protection Clause." However, the justice made it clear that under this standard such classifications would only be upheld if they served "important governmental objectives" and were "substantially related to achievement of those objectives." In other words, to justify such classifications, more than a rational basis would have to be shown. Hence, the intermediate standard—something less than strict scrutiny but something more than rationality—was stated for the first time. Justice Brennan found that the classification employed by the statute here was not substantially related to the achievement of important governmental objectives because there was no proof that the statute enhanced traffic safety, as was argued by the state.

In the case of *Orr v. Orr*, 440 U.S. 268 (1979), a state statute allowed awards of alimony to women but not men. In Justice Brennan's majority opinion, he again applied the intermediate level of scrutiny stating that the classification was not substantially related to the achievement of important governmental objectives because it used sex as a "proxy for need" and was stereotypic in assuming that women need "special protection."

Recently, the issue of sex discrimination arose in the draft registration case, *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (included in Cases for Students). Pursuant to Congress' constitutional power "to raise and support Armies" and "provide and maintain a Navy," Congress rejected President Carter's recommendation to have both men and women register for the draft and passed a resolution providing that only men between ages 18 to 21 register. The Supreme Court held that Congress acted within its constitutional authority in authorizing draft registration for men, and not women. The Court held that Congress was entitled to considerable deference in military matters because of the express prescription in the Constitution and the Court's own incapacity to effectively review national defense matters. Relying on federal laws and military policy excluding women from military combat service, the Court said that Congress was entitled to treat women differently for the purposes of draft registration, since the purpose of registration was to prepare for a draft of combat troops.

Justice Marshall filed a dissenting opinion stating that he would have applied the intermediate standard from *Craig, supra*, to this case. He found that the sex classification was not substantially related to the achievement of the important objective of maintaining a military force. The Justice said that registration of women would not detract from the draft, since military needs were not solely for combat services.

This developing intermediate standard of review in the equal protection analysis has been accepted by a plurality of the Court. Whether this standard is to be wholly accepted as part of the equal protection analysis will be determined in future decisions. But many of the justices have argued for its adoption in cases involving affirmative action and classifications based on sex, legitimacy, and wealth.

b. Illegitimacy

How the Court will review classifications according to legitimacy is another area in which the standard wavers. In *Levy v. Louisiana*, 391 U.S. 68 (1968), a state statute excluded illegitimate children from maintaining wrongful death actions on the basis of their parent's death. The Court clearly attempted to employ the rational basis standard in striking down the state statute here but spoke of the invidious nature of classifications based on legitimacy. In *Mathews v. Lucas*, 427 U.S. 495 (1976), a provision of the Social Security Act made certain illegitimate children eligible for benefits based on their dependency if it was shown that the deceased wage-earner was the child's parent and, at the time of his or her death was living with the child or was contributing to the child's support. This showing was not necessary for other children because dependency was presumed. The Court first rejected application of the strict scrutiny standard here, instead applying a rationality standard. The Court found that the purpose of the provision was to provide assistance based upon the dependency of the child. Since the classification concerning illegitimate children was reasonably related, as an administrative convenience, to the determination of dependency, the court found it valid. But then, the Court talked of substantial relation between the purpose of the provision and the classification indicating that more judicial scrutiny may be called for than in the traditional rationality test.

c. Poverty

Is poverty a suspect classification? In the important case of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (included in Cases for Students), the appellees challenged the Texas method of public school financing on the basis that expenditures per pupil varied between school districts so that expenditures in low tax base districts were much lower than expenditures in high tax base districts. Justice Powell's opinion for the majority rejected the challenge on account of wealth discrimination, noting that there was no class of identifiably poor persons discriminated against under the system. Therefore, no suspect classification was found requiring strict scrutiny by the Court. In a dissenting opinion by Justice Marshall, he believed the issue was discrimination on the basis of group wealth and that "careful Judicial scrutiny" of such a classification was necessary. Here, such scrutiny showed that the classification bore no relationship to the important governmental interests of education.

In sum, the Court has indicated some characteristics utilized in determining the "suspectness" of the classifications discussed above. In *Frontiero, supra*, concerning sex-based classifications, Justice Brennan looked to the visibility and immutability of the classification. In *Rodriguez, supra*, involving wealth discrimination, Justice Powell noted a number of characteristics that typify the "traditional indica of suspectness"—is the class "saddled with disabilities," "subjected to a history of purposeful unequal treatment," "relegated to a position of political powerlessness," or in need of "protection from the majoritarian political process." Finally in *Mathews, supra*, regarding classifications as to legitimacy, Justice Stevens' dissenting opinion looked at the customs and traditions used to justify invidious classifications.

d. Preferential Treatment to Redress Past Discrimination—Affirmative Action

It is a fundamental principle of the law that "where there has been a wrong, there must be a remedy." What remedies are to be designed for societal wrongs (past discrimination, segregation, unequal opportunity) committed against groups of people? Will such remedies include classifications which unconstitutionally infringe on the rights of other? The controversy surrounding affirmative action and other antidiscrimination programs has involved such issues.

These issues have arisen in cases involving federal laws which granted some Native Americans a preference in employment in the Bureau of Indian Affairs (approved in *Morton v. Mancari*, 417 U.S. 535 (1974)—preference reasonable because "political not racial" and furthers Indian self-government); federal laws giving females a longer tenure of service in the Navy over males before mandatory discharge for failure of promotion (approved in *Schlesinger v. Ballard*, 419 U.S. 498 (1975)—rational purpose in compensating women for lack of opportunity in the past); and federal laws allowing women to exclude more low-paying earning years than men in computing Social Security benefits (approved in *Califano v. Webster*, 430 U.S. 313 (1977)—served important governmental objectives and substantially related to achievement of those objectives because "compensated women for past economic discrimination").

Recently, the Supreme Court was confronted with these issues in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (included in Cases for Students). Here, Bakke challenged the constitutionality of a special admission program at the University of California at Davis Medical School. Candidates for this special admission program indicated whether they were "economically and/or educationally disadvantaged" or members of a "minority group." They were considered separately from general admission candidates, and sixteen positions out of a total of 100 were set aside for the special admission program. Bakke, a white, male applicant, applied twice for general admission but was rejected although applicants admitted under the special admission program had lower grade point averages and admission test scores. Bakke argued that the special admission program excluded him on the basis of race in violation of the Equal Protection Clause and Title VI to the 1964 Civil Rights Act, which prohibited the exclusion of any person on the grounds of race, color, or national origin from a program receiving federal aid.

With an unusual alignment of many opinions, it was Justice Powell who represented the final decision of the Court. Justice Powell sided with four other justices (Stevens, Burger, Stewart, and Rehnquist) to hold that the special admission program was illegal and that Bakke should be admitted into the school. He then sided with four other Justices (Brennan, White, Marshall, and Blackmun) to hold that the race of an applicant could be taken into account in the admission process.

Although they would agree with Justice Powell that the Davis special admission program was illegal, Justices Stevens, Stewart, and Rehnquist, and Chief Justice Burger also believed that the program violated Title VI of the 1964 Civil Rights Act because Bakke was excluded from the special admission program solely because of his race. Thus these justices based their decision on the federal statute and did not reach the constitutional issues.

Justice Powell utilized an equal protection analysis and found that the special admission program made classifications based on race. He found no merit in the argument that because the classifications applied to a white male they were not suspect. He held that all racial classifications were inherently suspect and, therefore, were subject to strict scrutiny.

Justice Powell then considered whether a compelling interest would justify the use of these racial classifications. He found that the race of an applicant could be considered as a factor in the admission process based on the compelling interest in attaining a diverse student body. However, he found the Davis approach violated the Equal Protection Clause because racial classifications were the *sole* factor in excluding white applicants from the special admission program, and less exclusive alternatives were available which allowed race to be considered as one factor among other equally valid factors contributing to diversity.

The Brennan opinion, with Justices White, Marshall, and Blackmun concurring, first agreed with Justice Powell that race could be taken into account in university admissions. They endorsed race-conscious affirmative action programs in general and also would have approved the Davis special admission program in particular. Justice Brennan would have applied the intermediate level of scrutiny to the Davis case as in *Craig, supra*. He felt that the classification involved here was not suspect because white males did not meet the criteria of suspectness, *i.e.*, as a class, they were not subjected to a history of discrimination and inferior treatment nor were they stigmatized as a politically powerless segment of society. He said if the classification could be justified as serving important governmental objectives and shown to be substantially related to the achievement of those objectives, then such a classification was valid. Justice Brennan found that the Davis special admission served the important governmental objective of remedying past societal discrimination, which resulted in substantial minority underrepresentation in medical schools.

In sum, the rule coming from the *Bakke* case states that where affirmative action programs, at least in education, give special consideration to the race of an individual, such programs may be valid so long as race is not the exclusive and determinative factor.

In another important case, this time involving a congressionally enacted affirmative action program in the construction industry, the Court, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), dealt with the issue of preferential treatment to redress past discrimination. In the Public Works Act of 1977, Congress included a provision requiring that at least 10% of any construction contract involving business with the federal government be set aside for "minority business enterprises"—minorities being defined as "Negroes, Spanish-speaking people, Orientals, Indians, Eskimos, and Aleuts." The requirement could be waived where the contractor demonstrated that it would be unfeasible because of a lack of minorities in the area. In the Chief Justice's opinion, Congress did not have to act in a "color-blind fashion" when attempting to prevent public expenditures from perpetuating the effects of past discrimination in the construction industry. He found that the 10% set aside was reasonably calculated to accomplish legitimate remedial objectives and would pass either the rationality or strict scrutiny test. Justice Powell concurred applying his *Bakke* approach to uphold the provision because Congress made sufficient findings of past discrimination in the construction industry. Justices Marshall, Brennan, and Blackmun found the provision acceptable under the intermediate equal protection standard. Justices Stewart and Rehnquist dissented because the government had acted to the detriment of many persons because of race.

Regarding affirmative action in the area of employment, *Fullilove* indicates that racial quotas may be used when findings of past societal discrimination by Congress support its race-conscious remedial action.

3. Classifications Affecting Fundamental Rights

A counterpart test under the strict scrutiny standard involves classifications that have deleterious effects on "fundamental" rights. In this area, the courts have primarily been concerned with a determination of what are the "fundamental" rights that are protected by the Equal Protection Clause. The determinative factor demarcating these rights is whether such rights are explicitly or implicitly guaranteed by the Constitution.

a. Free Expression

The Court in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (included in Cases for Students) applied the strict scrutiny test to a local disorderly conduct ordinance that prohibited picketing near a public school but exempted picketing involving a labor dispute. The appellee had singly conducted a peaceful picket outside a high school, claiming it practiced racial discrimination. When told he would be arrested under the ordinance if he continued picketing, he filed a suit claiming the ordinance punished activity protected by the First Amendment and denied him equal protection by exempting labor picketing from the general prohibition. The Supreme Court held the ordinance to be unconstitutional in making an impermissible distinction between labor picketing and other peaceful picketing. The Court said that although states were allowed to regulate picketing in the public interest, such regulations were subject to strict scrutiny and must serve a substantial governmental interest. The Court found that the ordinance allowed forbidden discrimination toward different means of expression based on the content of the expression.

b. Right to Travel

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court invalidated a state statute requiring residency in the state for at least one year in order to become eligible for public welfare. The Court reasoned that the statute created two classes of residents—needy residents residing in the state for a year or more and needy residents residing in the state less than a year. Applying the strict scrutiny standard, the Court found that such a classification penalized the exercise of the right to travel between states. Such a right, according to the Court, was implicitly guaranteed by the Constitution, and classifications impinging upon such a right could only be justified if necessary to promote a compelling governmental interest. The Court found that the state had no compelling interest in deterring the migration of indigents into the state since this would burden their right to interstate travel.

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court similarly struck down a one-year residency requirement in order to receive non-emergency medical care at the public's expense. The Court implied that the infringement on the right to travel was buttressed by the significance of the governmental benefit (welfare assistance and medical care assistance) involved.

c. Right to Vote

In an important equal protection case, *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court applied the strict scrutiny standard to state legislative apportionment invalidating a state plan which did not provide fair and effective representation for all citizens. The Court found that apportionment based on geographical rather than population criteria often disproportionately affected large urban districts in favor of small urban districts. The Court held that the right to vote was a fundamental interest, and apportionment plans based on anything but population—"one person, one vote"--could not be justified as advancing any compelling governmental interest.

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) involved a challenge to the constitutionality of a state poll tax which required all citizens to pay a $1.50 fee in order to vote. The Court held that qualifying the right to vote on the ability to pay the fee was unconstitutional because the right to vote was a fundamental right that could not be burdened by classifications according to wealth.

Dunn v. Blumstein, 405 U.S. 330 (1972), involved a state requirement that a voter be a resident of the state for at least one year and the county for at least three months in order to register to vote. The Court applied the strict scrutiny test holding that the durational residence requirement would be invalid unless necessary to meet a compelling state interest. The Court struck down the requirement on two counts as an infringement on the right to vote and the right to interstate travel, both being fundamental rights.

d. Right to Privacy

The Supreme Court has recognized a right of personal privacy implicitly guaranteed by the Due Process Clause. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that a woman's decision as to whether to terminate her pregnancy was within her constitutionally protected right of privacy. Therefore, the Court said that during the first trimester of pregnancy, the state could not unduly interfere with a woman's "abortion decision."

After the controversial decision in *Roe*, cases arose involving the right to make the "abortion decision" and equal protection. In *Maher v. Roe*, 432 U.S. 464 (1977), the issue was whether the Equal Protection Clause required a state welfare program to pay the medical expenses incident to indigent women's nontherapeutic abortions when it paid for medical expenses incident to childbirth. A federal district court invalidated the regulation, holding that the state was discriminating against those seeking to exercise a fundamental right based on the state's own notion of morality since it singled out this among many expenses arising from pregnancy. The Supreme Court reversed the district court, stating that *Roe* did not stand for a "constitutional right to an abortion." The Court said the fundamental right protected in *Roe* was the woman's freedom of choice. Here, the Court found that the state regulation did not infringe upon a woman's freedom of choice because the state could legitimately favor childbirth over abortion in its administration of public funds. Based on this same interest, the Court upheld the regulation under the rationality test.

e. Nonfundamental Rights

The Supreme Court has also had to make difficult distinctions between constitutionally protected fundamental interests and important but nonfundamental interests. *Dandridge v. Williams*, 397 U.S. 471 (1970), involved a state regulation that placed a financial ceiling on the total amount of public assistance a family could receive under the state welfare program. The regulation was challenged on the basis that it discriminated against large families with needs greatly in excess of the maximum limit on benefits. The Court was unwilling to find a fundamental right to receive public welfare since such an interest had no explicit constitutional basis. Because the regulation involved here was in the field of social welfare, the Court held that the rationality standard applied and the regulation was upheld.

In *Rodriguez, supra*, the Court held that education was not a constitutionally protected fundamental right under the Constitution and thus withheld application of the strict scrutiny standard to this interest. The Court noted the importance of education but found no constitutional basis to hold education to be a fundamental right. The Court's concern was that such a holding would put it in a legislative rather than judicial role.

E. CONCLUSION

Because of the socially sensitive issues confronting the courts in the area of equal protection, the reoccurring problem regarding judicial review of such issues remains one of the most difficult assignments for the Supreme Court. As the ultimate arbiter of constitutional standards of review, it will be interesting to see if the Court, as a whole, accepts the trend toward injecting an intermediate level of review in the equal protection analysis or develops a novel multi-level standards.

5. Religion and Constitutional Law

by David M. Schimmel

Cases for Students

A. School Prayer and Bible Reading
Abington School District v. Schempp, 374 U.S. 203 (1963)
Is it unconstitutional to require prayers or Bible reading in public schools?

B. Conflicts Between Religious Practices and the Law
People v. Woody, 61 Cal. 2d 716 (1964)
Do members of the Native American church have the right to use peyote in their religious ceremonies?

C. Teaching About Evolution
Epperson v. Arkansas, 393 U.S. 97 (1968)
Is it unconstitutional to prohibit schools from teaching about evolution?

D. Compulsory Education and the Amish
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Can the state compel students to go to school if schooling violates their religious beliefs?

E. The Ten Commandments in School
Stone v. Graham, 449 U.S. 39 (1980)
May states require that the Ten Commandments be displayed in all public school classrooms?

Summary of the Law for Lawyers and Teachers

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  3. The Religion Clauses

B. The Establishment Clause
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5. Religion and Constitutional Law

Cases for Students

A. SCHOOL PRAYER AND BIBLE READING: *Abington v. Schempp* (1963)

Facts

Roger and Donna Schempp, students in Pennsylvania's Abington High School, believed that reading the Bible and reciting the Lord's Prayer during opening exercises at the school violated their First Amendment rights. Each day, ten verses from the Bible were chosen and broadcast over the intercom system without comment by students. This was followed by the Lord's Prayer, the flag salute, and announcements. The law that required the Bible reading also allowed students to be excused upon the written request of their parents. Mr. and Mrs. Schempp considered having their children excused but felt that this would result in their being considered "oddballs" and perhaps "un-American atheists." Therefore, Roger, Donna, and their parents felt the school's "religious activities" violated their rights, and they took their case to court.

Issues for Discussion

1. What specific part of the Constitution is relevant to this case? Does the First Amendment apply to Pennsylvania?
2. Does the Pennsylvania Bible reading law constitute an "establishment of religion?" Does it interfere with the Schempps' religious freedom? Even if it does, wouldn't the option to be excused solve the problem?
3. What about the rights of those who want to pray? Shouldn't they have as much freedom as those who don't?

NOTES:

Decision of the United States Supreme Court

A state law requiring the reading of the Bible and the recitation of the Lord's Prayer at the opening of the school day violates the Establishment and Free Exercise Clause of the First Amendment.

Reasoning of the Court

On behalf of the Court, Justice Clark explained that the First Amendment, which prohibits Congress from making laws "respecting an establishment of religion or prohibiting the free exercise thereof," also prohibits state governments from making such laws. This is because the Supreme Court has ruled that the "liberty" mentioned in the Due Process Clause of the Fourteenth Amendment incorporates the freedoms guaranteed in the First Amendment.

Justice Clark wrote that the Establishment Clause rests on the belief "that a union of government and religion tends to destroy government and to degrade religion." When the government aids one form of religion, it incurs "the hatred, disrespect, and even contempt" of those who hold contrary beliefs. Therefore, the government must be neutral in matters of religion; it should not prefer one religion over another, nor should it prefer religion over non-religion. Similarly, the Free Exercise Clause of the First Amendment recognizes the right of every person to freely choose his own religious training and observance, free of any influence by the government. To guarantee this neutrality, the government cannot pass any laws unless they have a "secular purpose" and their "primary effect neither advances nor inhibits religion."

Applying these principles to the facts of the Schempp case, the Court found that the state violated the First Amendment. This was because state law required students to attend school and required the reading of the Bible and the recitation of the Lord's Prayer under the supervision of school authorities. The Court found that these opening exercises were a "religious ceremony" and that the laws requiring them violated the rights of the Schempp children and their parents.

The fact that parents could excuse their children from the religious exercises did not save the law. In an earlier case, the Court wrote that when the power, prestige, and support of the government is placed behind a particular religious belief or practice, "the indirect coercive pressure upon religious minorities to conform" to the prevailing "officially approved" religious practice is plain.

Finally, the Court emphasized that this decision, which protects the right of the Schempp family, does not interfere with the religious freedom of the majority. While the Free Exercise Clause prohibits government from denying *anyone* their right to freedom of religion, "it has never meant that a majority could use the machinery of the State to practice its belief." As Justice Clark noted, the purpose of the Bill of Rights was to place certain fundamental liberties such as religious freedom "beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

In a dissenting opinion, Justice Stewart wrote that if religious exercises are prohibited in schools, then secularism is favored and religion is placed at a "state-created disadvantage." According to Justice Stewart, a position of neutrality on the church-state issue would allow but not require religious activities.

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B. CONFLICTS BETWEEN RELIGIOUS PRACTICES AND THE LAW: *People v. Woody* (1964)

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Facts

On April 28, 1962, a group of Navajo Indians met in the California desert to perform a religious ceremony which included the use of peyote. Police officers, who observed the ceremony, arrested Jack Woody and several other Indians because their use of peyote (which causes hallucinations) violated state law.

Peyote plays a central role in the ceremony and practice of the Native American Church. Members believe that peyote embodies the Holy Spirit and that those who use it enter into direct contact with God. It serves as a sacramental symbol similar to bread and wine in Christian churches, and its use for non-religious purposes is sacrilegious.

Woody claimed that prohibiting members of his church from using peyote restricted their freedom of religion. The prosecution argued that police could not effectively enforce narcotics laws if exemptions were granted to anyone who claimed he was using peyote for religious purposes.

Issues for Discussion

1. Did the enforcement of California's law against using peyote interfere with Woody's religious beliefs and practices? Should the courts prohibit the enforcement of these laws against Indians? Against anyone who uses drugs for religious purposes?
2. Should all religious beliefs and practices be protected by the Constitution? Or should beliefs receive more protection than practices?
3. Are there any circumstances in which police should enforce laws that restrict religious practices or ceremonies?

Decision of the California Supreme Court

The religious practice by the Native American Church involving use of peyote is protected by the First Amendment and, therefore, exempt from enforcement of a state's narcotic laws.

NOTES:

Reasoning of the Court

The court found that the statute against using peyote seriously interfered with the religious freedom of members of the Native American Church since the "sacramental use of peyote composes the cornerstone" of their religion. But this finding did not resolve the case because it dealt with religious practice, not belief. While the Constitution's "prohibition against infringement of religious belief is absolute," governments can restrict religious practices if the restrictions serve a "compelling state interest."

According to the court, the state did not have compelling reasons to enforce the laws against peyote which restricted Woody's religious freedom. Evidence indicated that Navajo children never used peyote, that its use caused no permanent injury, that it was only used during religious ceremonies, that other states allowed Indians to use peyote for sacramental purposes, and that this did not prevent those states from effectively enforcing their narcotics laws.

In view of this evidence, the court weighed the competing arguments of Woody and the prosecution "on the symbolic scales of constitutionality." On one side they placed the weight of freedom of religion; on the other, the weight of the state's "compelling interests." Since the use of peyote was an essential part of Woody's religious experience, greater weight is given to the religious practice. Since granting members of the Native American Church an exemption from the enforcement of the narcotics laws presents only a slight danger to the state, the second weight is relatively light. Thus the court concluded that "the scale tips in favor of constitutional protection."

C. TEACHING ABOUT EVOLUTION: *Epperson v. Arkansas* (1968)

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Facts

As a result of support by certain religious groups, the Arkansas Legislature passed an "anti-evolution" statute in 1928. The law prohibited any state-supported school from teaching the theory that "mankind ascended . . . from a lower order of animals." In 1965, Susan Epperson, a young zoology teacher in a Little Rock high school, wanted to use a new biology text that contained a chapter on Darwin's theory of evolution. Because Epperson feared that her use of the text would violate state law and result in her dismissal, she asked an Arkansas court to declare the anti-evolution law unconstitutional. The trial court held that the law violated the First Amendment, but the Supreme Court of Arkansas upheld the law as a reasonable exercise of the state's power to specify the curriculum in public schools. Epperson appealed to the United States Supreme Court.

Issues for Discussion

1. Does the anti-evolution law violate the First Amendment? Does the teaching of evolution violate the religious beliefs of some citizens? What reasons or evidence supports your view?
2. What is the purpose of the Arkansas law? Does it aid or support any religious belief?
3. Even if a religious group cannot control the curriculum, does a state have the authority to decide what is and is not taught? Are there limits to this authority?

Decision of the United States Supreme Court

A state law prohibiting the teaching of the theory of evolution in public schools violates the Establishment Clause of the First Amendment.

Reasoning of the Court

On behalf of the Court, Justice Fortas outlined the principles to be applied in this case. Under the Constitution, the government may not adopt programs or practices in its schools which "aid or oppose" any religion. The First Amendment "does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." Government should not be involved "in protecting any or all religions from views distasteful to them." Thus the state's "undoubted right" to determine the school curriculum does not carry with it the right to prohibit the teaching of a scientific theory "where that prohibition is based upon reasons that violate the First Amendment."

In this case Arkansas prohibited its teachers from discussing the theory of evolution because it is contrary to the belief that "the Book of Genesis must be the exclusive source of doctrine as to the origin of man." The fundamentalist religious views of some Arkansas citizens "is the law's reason for existence." The purpose of the law was "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." The law does not prohibit all discussion of the origin of man, only a particular theory that seems to conflict with the Biblical account. Therefore, the law cannot be defended "as an act of religious neutrality" and clearly violates the First Amendment.

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D. COMPULSORY EDUCATION AND THE AMISH:

Wisconsin v. Yoder (1972)

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Facts

Jonas Yoder and several other Amish parents believed that high school attendance was contrary to their religion. Therefore, they refused to send their 14- and 15-year-old children to school after they graduated from the eighth grade. Although they were convicted of violating Wisconsin's compulsory school attendance law (which requires schooling until 16), they believed the law violated their First Amendment rights and appealed their conviction.

The Amish de-emphasize material success, reject competition, and believe that salvation requires life in a church community separate from worldly influences. They object to high schools because of the values they teach—competitiveness, peer group conformity, worldly success, and technical knowledge. These values conflict with the Amish way of life and "alienate man from God." The Amish do not object to sending their children to the local elementary school because they believe children should have basic education to enable them to read the Bible, to be good farmers and citizens, and to deal with non-Amish people, when necessary. The state argued that compulsory education was necessary to prepare citizens to be self-reliant and to participate effectively in our political system.

Issues for Discussion

1. Are there good reasons for laws compelling students to attend school? Should Amish children be exempt from such laws? Are there other children who should also be exempt?
2. What criteria should be used to decide who should and should not be required to go to school? Who should make this decision—the students, the parents, educators, or the courts?

Decision of the United States Supreme Court

A sincere and long-established religious group will be exempted from a state's compulsory school attendance law where such a law would endanger or destroy the free exercise of the group's religious beliefs.

NOTES:

Reasoning of the Court

The Court began by noting that while a state has the power to regulate the "duration of basic education," its power is not absolute when it restricts other fundamental rights such as freedom of religion. In such cases, courts must balance the rights in conflict. To compel school attendance in this case, Wisconsin must show that its law does not significantly restrict religious belief or that its interest in compulsory education is of compelling importance.

Based on the evidence in this case, the Court found that compulsory secondary schooling "would gravely endanger if not destroy" the free exercise of Amish religious beliefs. Nevertheless, Wisconsin argued that compulsory education was necessary to protect children against ignorance and to equip them for life outside the Amish community if they wished to leave. However, Justice Burger wrote that the Amish are "productive law-abiding members of society" who are self-sufficient, provide for their own dependents, and accept no public welfare. "This," he wrote, "is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief." Justice Burger emphasized that this decision in favor of the Amish would not apply to any group of parents who defied a state's compulsory education laws. It would apply only to sincere, long-established religious groups who can prove they are seriously threatened by such laws and who provide adequate alternatives for their children's education.

In a partial dissent, Justice Douglas argued that a case like this should not be decided without weighing the views of the Amish children. According to Justice Douglas, if a child is "harnessed to the Amish way of life" by his parents, his education will be truncated and "his entire life may be stunted and deformed."

E. THE TEN COMMANDMENTS IN SCHOOL: *Stone v. Graham* (1980)

NOTES:

Facts

In 1978, the Kentucky legislature passed a law requiring that a copy of the Ten Commandments, purchased with voluntary contributions, be displayed in every public school classroom. The law also required that the following notation appear below each copy: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." But a group of citizens challenged the law in a Kentucky court. They argued that it violated the First Amendment which prohibits the government from making a law "respecting an establishment of religion" which does not have a secular purpose. Although divided, the Kentucky Supreme Court upheld the law. The citizens appealed to the United States Supreme Court.

Issues for Discussion

1. Do you think the Kentucky law violated the First Amendment?

2. Did the law have a secular legislative purpose? If the legislature says the purpose of this law is secular, does that make it constitutional?

3. Is the Ten Commandments a secular or religious document? What do the first four commandments command? (See Exodus 20:12-17 and Deuteronomy 5:16-21 in the Bible.)

4. If the Ten Commandments are religious, would this mean they can never be read in school? Or is it sometimes permissible to study excerpts from the Bible and other religious literature?

5. Even if it were unconstitutional for the schools to buy copies of the Ten Commandments, may they be displayed if purchased with private, voluntary contributions?

Decision of the United States Supreme Court

A state law requiring the posting of the Ten Commandments in public schools violates the Establishment Clause of the First Amendment.

NOTES:

Reasoning of the Court

A majority of the Court ruled that the Kentucky law had no secular purpose and was therefore unconstitutional. According to the Court, the purpose of the law "is plainly religious," and "no legislative recitation of a supposed secular purpose can blind us to that fact."

Don't the Commandments contain secular legal principles that are relevant to all citizens? No, they are not simply universal rules prohibiting murder, stealing, false witness, adultery, and covetousness. Rather, the first part of the Commandments are primarily concerned with theological beliefs and religious obligations. They command us to worship the Lord God alone, not to use the Lord's name in vain, to observe the Sabbath day and keep it holy, and to avoid worshipping idols.

Does this mean that students can never read the Bible or study the Ten Commandments in school? On the contrary, the Court suggests that the Ten Commandments may be integrated into the school curriculum and that the Bible may be used when presented objectively as part of a secular study "of history, civilization, ethics, comparative religion or the like." But the posting of religious texts in classrooms serves no such educational function. According to the Court, its purpose is "to induce the schoolchildren to read, meditate upon, perhaps venerate and obey the Commandments." Although the First Amendment certainly protects the right of individuals to post religious texts in their homes and church schools, it clearly prohibits the government from doing this in the public schools.

The fact that copies of the Commandments are purchased by private, voluntary contributions, does not make the law less objectionable. The posting of the copies under the auspices of the legislature provides the official support of the state government that the Establishment Clause prohibits.

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

1. Historical Context

As history texts remind us, many early settlers came to the New World to escape religious oppression. They left countries where citizens were expected to accept the beliefs of the established church, where people whose religion was different were considered disloyal, and where religious persecution was supported by the government. But after they achieved religious freedom in America, many colonists became intolerant of those whose faith was different from their own. In some colonies, citizens were legally persecuted for witchcraft, and dissenters were driven away. In others, "equal tolerance" of all beliefs meant tolerance only for Christians or even just for Protestants. Religious discrimination was often enforced by law.

To prohibit these Old World practices from continuing, the framers of the Constitution wanted to insure that the government would not establish or support any church and would protect the right of all citizens to practice their religion freely. This goal was incorporated into the First Amendment in these words: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This chapter examines how the courts have interpreted these words in relation to schools and communities. In the process, judges have been forced to rule on school prayer, the teaching of evolution, aid to religious schools, drug use, and other sensitive and controversial issues that continue to divide us in the 1980's.

2. The Intent of the Framers

When the precise meaning of a constitutional or statutory provision is not obvious, judges must consider the intention of its authors. What then did the framers mean by their references to religion in the First Amendment?

There are several schools of thought that influenced the drafters of the Bill of Rights. First was the Jeffersonian view that only the complete separation of religion from politics would protect the government from religious institutions. He, therefore, urged a strict "wall of separation between church and state." Second was the view of Roger Williams who saw separation as a way to protect the churches against state control and "worldly corruptions." Third was the Madisonian view that both religious and governmental interests would be advanced and protected best if each were left free from the other. *American Constitutional Law*, Laurence H. Tribe, Foundation Press (1978), pp. 816-17.

3. The Religion Clauses

Based on the views of men like Madison, Jefferson, and Williams, the framers of the First Amendment drafted two "religion clauses": the Establishment Clause ("Congress shall make no law respecting an establishment of religion") and the Free Exercise Clause ("or prohibiting the free exercise thereof.") While these clauses only appear to restrict actions of the federal government, they have been incorporated into the Fourteenth Amendment by the Supreme Court and therefore apply equally to state action. *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). In some cases, the two clauses overlap; in others their focus is different.

The Establishment Clause is often used by citizens objecting to government action that they believe unconstitutionally promotes religion such as laws aiding church schools or prohibiting work on Sunday. The Free Exercise Clause is usually asserted by individuals who believe that the government has unconstitutionally restricted their religious practice, *e.g.*, by requiring school attendance or prohibiting drug use. This section examines both of these clauses and some of the major cases decided under them.

B. THE ESTBLISHMENT CLAUSE: A THREE-PART TEST

The Supreme Court has developed three tests to be used in deciding whether a law, which is alleged to violate the Establishment Clause, is constitutional. First, "the state must have a secular legislative purpose." Second, its "primary effect must be one that neither advances nor inhibits religion." Third, the law "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

1. Secular Purpose

In two highly publicized cases, the Supreme Court has used the secular purpose requirement to declare state education laws unconstitutional. The first was the Arkansas "anti-evolution" statute, and the second was a Kentucky law requiring the posting of the Ten Commandments in classrooms.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968) (included in Cases for Students), the Court struck down a 1928 law that prohibited teaching evolution in public schools or universities. According to the Court, "the statute was a product of the upsurge of 'fundamentalist' religious fervor of the twenties" and was an adaption of the famous Tennessee "monkey law" which was upheld in the celebrated *Scopes* trial in 1927.

"Government in our Democracy," wrote the Court, "must be neutral in matters of religious theory, doctrine and practice." It may not promote one religious theory against another or even against non-religion. But the Arkansas law prohibits the teaching of one theory "for the sole reason that it is deemed to conflict with a particular religious doctrine: that is, with a particular interpretation of the Book of Genesis." The record of the case indicated no secular purpose for the law and seemed to be justified only by "the religious views" of some citizens. Because the law could not be justified as "an act of religious neutrality," it violated the First Amendment.

Could states require that schools teaching about evolution also teach the Biblical view of creation? Or would this be unconstitutional under *Epperson*? There is not yet a

Supreme Court ruling on this issue. Although the purpose of requiring the Biblical account would probably be religious, it has been argued that schools have an obligation to fairly present both sides of controversial issues and that by presenting both theories, the government would not be supporting a religious view but would be maintaining neutrality. On the other hand, the Sixth Circuit declared a Tennessee law unconstitutional which prohibited any text that referred to the creation of man and his world unless (1) it specifically states that evolution is a theory and not a scientific fact and (2) "commensurate attention" is given to other theories, "including but not limited to, the Genesis account in the Bible." *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). Furthermore, in a 1981 California case, the judge refused to order schools which teach about evolution to also teach the Biblical view of creation. *Segraves v. State of California*, No. 278978, Superior Court, County of Sacramento, June 12, 1981.

In the recent case of *Stone v. Graham*, 449 U.S. 39 (1980) (included in Cases for Students), the secular purpose requirement was also decisive. In *Stone*, the Supreme Court overturned a 1978 Kentucky law which required the posting of the Ten Commandments in all public school classrooms. Despite a statement by the legislature about the secular application of the Commandments to American legal codes, the Court ruled that the purpose of the law "is plainly religious," and "no legislative recitation of supposed secular purpose can blind us to that fact."

On the other hand, in non-school settings, the Court seems to be more liberal or generous in applying its secular purpose requirement. Thus in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court refused to find Sunday closing laws unconstitutional, although their origins were clearly religious, the day is of special significance to certain religious groups, and some laws refer to Sunday as the "Lord's Day" and the "Sabbath." A lengthy majority opinion detailed the many secular reasons for a state providing its citizens with one uniform day of rest as a "time of mental and physical recuperation from the strains and pressures of their ordinary labors." The fact that the law may confer a "remote" and "incidental" benefit to religious institutions and that Sunday is "a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."

2. Secular Effect

Even if a government policy has a secular purpose, it would violate the Establishment Clause if its primary effect is to support religion. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court held that a New York law which provided tax relief for the parents of nonpublic schoolchildren was unconstitutional because 85% of the students who benefited went to church-affiliated schools, and the primary effect of the law was to "subsidize and advance the religious mission of sectarian schools."

This does not mean that a law would be unconstitutional simply because its secular effects also assists religious institutions. Thus the Court upheld a New Jersey law which reimbursed all parents for the money they spent sending their children to a public, private, or parochial school on public buses. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court ruled that a law which encouraged *all* students to ride public buses to school rather than run the risk of traffic and other hazards incident to walking or hitchhiking did not violate the First Amendment. "That Amendment," wrote Justice Black, "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."

Similarly, the Court has upheld laws which exempt churches and religious schools from taxation because the primary purpose and effect of the laws was to grant tax relief to *all* educational and charitable nonprofit institutions including hospitals, libraries, scientific, professional, historical, and patriotic groups. *Walz v. Tax Commission*, 397 U.S. 664 (1970). On the other hand, the Court noted that eliminating tax exemptions for religious institutions could "expand the involvement of government [in religious affairs] by giving rise to tax evaluation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal proceedings."

3. No Excessive Entanglement

This requirement reflects Madison's concern that secular and religious authorities not interfere excessively in each other's spheres or both could be corrupted. "A union of government and religion," wrote the Court, "tends to destroy government and degrade religion." *Engel v. Vitale, infra.*

One form of forbidden government entanglement involves excessive state supervision of religious institutions and personnel. This would occur if the government had to police the expenditure of tax money by parochial schools to insure that such funds were only spent for secular purposes. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court held that Rhode Island could not provide salary supplements for teachers in religious schools since such teachers were not providing a clearly separate secular service and might inculcate religion. To avoid violating the Establishment Clause, the state must engage in continuing "inspections and evaluation" of the subsidized teachers and their work in church-related schools. This, wrote Chief Justice Burger, would result in the kind of "excessive and enduring entanglement between state and church" that is forbidden by the First Amendment. On the other hand, the Chief Justice emphasized that not all government expenditures for parochial schools would involve excessive entanglement. In fact, prior Supreme Court decisions have permitted states to provide church-related schools with "secular, neutral, or nonideological services, facilities or materials" such as "bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students." In cases such as these, the relatively formal and limited contacts between church and state do not involve an excessive entanglement which would violate the Establishment Clause.

In short, to uphold a statute challenged under the Establishment Clause, the state must show that the law has a secular purpose, that any effect that benefits religion is indirect and incidental, *and* that it involves no excessive entanglement between the government and religious institutions.

C. THE FREE EXERCISE CLAUSE

Cases under this clause usually arise when an individual or group asserts that a law restricts the free exercise of their religion and, therefore, should not apply to them. Thus citizens have argued that they should be exempt from laws concerning taxes, drugs, mail fraud, compulsory education, and public health. How should these cases be decided? Should judges consider whether the religion is true or believable? In *United States v. Ballard,* 322 U.S. 78 (1944), the Supreme Court ruled that judges should not examine the truth of a person's faith. *Ballard* involved a mail fraud charge against a group that claimed to have supernatural powers to heal incurable diseases. Despite skepticism about the group's claims, Justice Douglas warned against government officials inquiring into the validity of religious beliefs. "Men may believe what they cannot prove," he wrote. "Religious experiences which are as real as life to some may be incomprehensible to others." If one could be sent to jail because a jury found his faith to be false, "little indeed would be left of religious freedom."

Does this mean that courts should simply accept a person's word concerning religious exemptions? If so, the Free Exercise Clause could become an excuse for avoiding the requirements of any law. To minimize the illegitimate use of this clause, judges consider whether the plaintiffs are sincere and whether the laws interfere with a central aspect of their religion. If so, the court will balance the rights of the believers against the interests of society in determining whether to grant an exemption in the pending case.

1. Sincerity

Although the government cannot challenge the validity or truth of people's faith when they claim exemptions based on religious grounds, their sincerity can be questioned. In such situations, the government must base its challenge on objective, extrinsic, and neutral evidence. In *Ballard,* for example, the prosecutor might have shown that the defendants had composed testimonials from nonexistent persons claiming to be healed and that they did not call themselves a religion until they were indicted. Similarly, a district court denied an exemption from federal drug regulations to the Neo-American Church when evidence showed that the claim of religion was an insincere tactic. Members of the church were known as Boo Hoos, its seal was a three-eyed toad, and its song was "Puff the Magic Dragon." *United States v. Kuch,* 288 F. Supp. 439 (D.D.C. 1968).

2. Centrality

In addition to being "sincere," believers seeking to be free from government regulations must show that such regulations restrict a central or essential aspect of their faith. In *People v. Woody,* 61 Cal.2d 716 (1964) (included in Cases for Students), the California Supreme Court ruled that prohibiting Navajo Indians from using peyote (a "hallucinogen") would restrict the free exercise of their religion. Evidence indicated that the use of peyote was central to the Navajo's religious tradition. According to the court, "It is the sole means by which defendants were able to experience their religion; without peyote, defendants cannot practice their faith."

In contrast, a federal appeals court rejected the claim of Dr. Timothy Leary that he should be free of federal laws restricting the transportation and use of marijuana. *Leary v. United States,* 383 F.2d 851 (5th Cir. 1967). Leary, who was converted to Hinduism, claimed that he used marijuana for religious illumination and meditation like many other Hindus. The court distinguished this case from *Woody* because the use of marijuana was not essential to Hindu belief and practice. In *Woody,* that court said "the sacramental use of peyote composes the cornerstone" of the Native American Church.

3. A Balancing Test

When a law seriously restricts the free exercise of a sincere religious belief, the courts balance the First Amendment rights of the citizens against the compelling interests of the state on the symbolic scale of constitutional justice. In *Woody,* the court weighed the competing rights of the Indians and the state in these words:

> Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet, the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.

Similarly, in *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (included in Cases for Students), the Supreme Court protected the right of Amish parents to practice their religious tradition free from the state's requirement that all children must go to school until 16 years of age. The Amish showed that compulsory schooling beyond the eighth grade would have a serious, detrimental impact on their basic religious beliefs. While the Court recognized the state's legitimate interest in universal education, it could not be "free from a balancing process when it impinges on [other] fundamental rights and interests such as those specifically protected by the Free Exercise Clause." Since the enforcement of the compulsory education law after the eighth grade "would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs," the Court held that such education was hardly necessary in this case. Similarly, the Court exempted students who were Jehovah's Witnesses from the requirement of the flag salute and the pledge of allegiance since these rituals seriously interfered with the students' religious beliefs, while freeing them from this requirement would not seriously harm the state. *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

Courts, however, have established clear limits to religious practices, especially those which endanger the public health, safety, or welfare. Thus, in *Reynolds v. United States,* 98 U.S. 145 (1878), the Supreme Court denied Mormons an exception to the anti-bigamy laws. According to the Court, polygamy was a matter of gravest concern and could lead to the destruction of our democratic society. The Court wrote that while laws may not "interfere with mere religious belief and opinions, they may with practices." To permit individuals to engage in unlawful behavior simply because of their religious belief would be "to permit every citizen to become law unto himself." Similarly, compulsory vaccinations have been upheld, despite constitutional objections, in the interest of protecting the public health. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). As the Court has noted: "The right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158 (1944). And in recent decades, courts have required children to receive blood transfusions and other essential medical treatment despite religiously motivated parents who did not believe in such medical care. *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968).

D. RELIGION IN SCHOOL

In the 1980's, political candidates and religious groups have revived the concept of voluntary prayer in the public schools as well as Bible reading and religious education. Whether such a revival will be successful may depend on the Supreme Court's willingness to follow or overturn their prior decisions on these issues.

1. Bible Reading

In *Abington School District v. Schempp*, 374 U.S. 203 (1963) (included in Cases for Students), the Court confronted this question: Could states require public schools to begin each day with readings from the Bible? The answer, wrote Justice Clark, is no. This is because compulsory Bible readings "are religious exercises" that violate the principle that "the Government maintain strict neutrality, neither aiding nor opposing religion." Since objecting students could be excused, shouldn't the majority have the right to read from the Bible? Does a ruling prohibiting such exercises restrict the majority's right to their free exercise of religion? Again, the Court said no. While the First Amendment "prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs." The Court noted that "the very purpose of the Bill of Rights was to withdraw certain subjects" from political debate, and to place them "beyond the reach of majorities and officials." In prohibiting Bible reading in the schools, Justice Clark concluded that "we have come to recognize through bitter experience" that "in the relationship between man and religion," the State must be firmly committed to a position of neutrality."

2. School Prayers

In New York, a local school board required that a nondenominational prayer be recited by students at the beginning of school each day. In *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court ruled that the prayer requirement violated the Constitution. Some people have asserted that prohibiting prayer in school indicates a hostility toward religion and prayer. "Nothing," wrote Justice Black, "could be more wrong." The Bill of Rights tried to put an end to governmental control of religion and prayer, but it "was not written to destroy either." The Court concluded that "it is neither sacreligious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves."

3. Transcendental Meditation

During the 1975-76 school year, five New Jersey schools offered optional courses in Transcendental Meditation to reduce student stress and improve health. But in *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979), the court ruled that the course violated the Establishment Clause. Although the course had a secular purpose, much of the class time and text taught about religious concepts, and students were expected to attend a brief religious ceremony during the course. The court ruled that these religious means of effecting secular goals were prohibited by the First Amendment. It also ruled that state funding of the course constituted an "excessive government entanglement in religion."

4. Silent Meditation or Prayer

In 1976, a group of Massachusetts parents challenged a state law that requires teachers "in all grades in all public schools" to observe a minute of silence "for meditation or prayer." In *Gaines v. Anderson*, 421 F. Supp. 337 (D.Ma. 1976), the court ruled that the law did not violate the Establishment Clause. Judge Murray observed that the law does not require prayer, it only requires students to be silent. Moreover, the law might serve legitimate secular purposes; it might "still the tumult of the playground, help start a day of study on a calm note, and help students learn self-discipline." The court also ruled that meditation does not advance religion; it allows students to reflect on a subject that may be "religious, irreligious or nonreligious."

Does meditation as a time for silent prayer indicate state support for religion? While *requiring* silent prayer would be unconstitutional, the law simply allows meditation *or* prayer. It accommodates those who want to use the moment of silence for prayer as well as those who wish to reflect on secular matters. Thus, it takes "a neutral position that neither encourages nor discourages prayer." The court acknowledged that the line separating "the permissible from the impermissible in this area is elusive," but it held that the law requiring silent meditation or prayer did not conflict with the Constitution.

5. Release Time

Can public schools release students during the school day to go to religious centers for religious instruction? This was the issue confronted by the Supreme Court in the New York case of *Zorach v. Clauson*, 343 U.S. 306 (1952).

Several years earlier the Court held that an Illinois release time program, in which public school classrooms were turned over to religious instructors, violated the Establishment Clause. But in *Zorach* the Court ruled that the New

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York program was not unconstitutional. On behalf of the Court, Justice Douglas wrote that the First Amendment "does not say that in every and all respects there shall be a separation of church and state." He suggested that the state and religion need not be "hostile" and "unfriendly." We can preserve neutrality and separation without going to "extremes to condemn the present law on constitutional grounds." Allowing school authorities to adjust student schedules to voluntarily attend religious instruction away from school at no public expense "accommodated the public service to their spiritual needs." To prohibit such a practice, wrote Justice Douglas, "would be preferring those who believe in no religion over those who do believe."

6. Invocations and Benedictions

Is it unconstitutional for public high schools to include a religious invocation and benediction in their graduation ceremonies? No, according to a federal district court in Virginia. In *Grossberg v. Deusebio*, 380 F.Supp. 285 (E.D. Vir. 1974), the court found that the invocation would be "brief, transient" and incidental to the degree awarding ceremony. According to the judge, "neither the primary purpose nor the primary effect of the invocation in its graduation context" was sufficient to violate the Establishment Clause. This was distinguished from the school prayer cases which were characterized by regular repetition designed to "indoctrinate." In contrast, the "short" and "fleeting" invocation in this case is similar to those that have dotted the history of public events and ceremonies in the United States. The court acknowledged the sensitivity of the invocation issue, but noted that an Establishment Clause violation was a matter of degree. "The question is not whether there is any religious effect at all, but rather whether that effect, if present, is substantial." In this case the court concluded it was not.

On the other hand, another federal court ruled that students in a public school could not hold their graduation ceremony in a Catholic church. Even though the seniors voted for the location and the ceremony was voluntary, some participants could not attend without violating their consciences. "Graduation," wrote the court, "is an important event for students" and "it is cruel to force any individual to violate his conscience in order to participate in such an important event." *Lemke v. Black*, 376 F.Supp. 87 (E.D. Wisc. 1974).

E. STUDENT QUESTIONS

Students often ask about the apparent inconsistencies in the way the Establishment and Free Exercise Clauses are interpreted by the courts. Why does our money say "In God We Trust" if there is supposed to be a clear separation of church and state? Why can students be asked to say the Pledge of Allegiance (which refers to God) but are prohibited from voluntarily praying to the same God in the same classroom? Why can clergymen give invocations in the U.S. Senate and at the president's inauguration but can't teach religion in the public schools? While the legal principles and cases outlined above should help answer these questions, three additional points may be useful.

1. No Complete Separation

Despite Jefferson's hope that Americans would erect a high wall of separation between the government and religion, this has not been required by the Supreme Court. As Chief Justice Burger pointed out in *Lemon, supra*, "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular case."

2. Stricter in Schools

While the barrier of separation between church and state may vary, it is clearly higher and more distinct in cases involving public school students. The Establishment Clause may not be offended by opening prayers in Congress or by tax exemptions for churches, but it is clearly offended by opening prayers in public schools or the use of tax money to promote religious education. This is because of the central and delicate role of the public schools in American life, because such students are compelled to attend, and because they are at a formative and impressionable age. Thus a teacher would not violate the Establishment Clause by preaching his religious beliefs in a public park but would clearly violate the Constitution by doing the same thing in a public school.

3. Teaching about Religion

The courts have been careful to distinguish between teaching religion, which is prohibited in the public schools, and teaching about religion, which is not. In a decision prohibiting school prayer and Bible reading at opening exercises, the Supreme Court acknowledged that a person's education may not be complete "without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." In *Schempp, supra*, Justice Clark even endorsed the study of the Bible in the public schools "for its literary and historic qualities." Although the Bible could not be used in religious exercises, the court emphasized that the "study of the Bible or of religion, when presented objectively as part of a secular program of education" would not violate the First Amendment.

F. CONCLUSION

Unlike freedom of speech or press, the words "freedom of religion" are not mentioned in the Constitution. Instead there are two clauses that were designed to protect the religious freedom of Americans. The first prohibits an "establishment of religion;" the second guarantees "the free exercise thereof." Courts have interpreted the Establishment Clause to require governments to be neutral in matters of religion. This means that the government should not promote one religion over another or favor religion over nonreligion. When laws are challenged under the Establishment Clause, they must pass a three-part test. They must have a secular purpose, their primary effect must not advance or inhibit religion, and they must not foster an excessive government entanglement with religion.

Citizens can challenge government regulations which restrict their religious practice under the Free Exercise Clause. If they are sincere and if the laws interfere with a central aspect of their faith, then the courts will balance the rights of the citizens against the interests of the state. Where the interference is substantial and the state interest is not, religious citizens may be exempted from certain government regulations. While insisting on neutrality, the courts have not required an absolute separation between church and state. Thus certain religious ceremonies and symbols have been permitted, such as the motto "In God We Trust" on our coins and invocations at public events. On the other hand, the courts have tended to be stricter in cases concerning the public schools, prohibiting government support of prayers, Bible reading and religious education.

6. Family Law

Cases for Students

A. The Right to Marry
Loving v. Virginia, 388 U.S. 1 (1967)
Is a state statute prohibiting interracial marriage constitutional?

B. Cohabitation
Marvin v. Marvin, 18 Cal. 3d 660 (1976)
Should courts enforce agreements between unmarried partners living together?

C. Child Custody
Bezio v. Patenaude, 410 N.E. 2d 1207 (1980)
Can a natural parent regain custody of her child after she has relinquished custody to a guardian? Should it make any difference if the parent is a homosexual?

D. Adoption
Doe v. Kelley, 6 Fam. L. Rptr. 3011 (1980)
Does a married couple who pays a woman to bear a child have a right to adopt the child immediately after birth?

E. Abortion
H.L. v. Matheson, 450 U.S. 398 (1981)
Is a state statute requiring doctors to notify the parents of an unemancipated minor seeking an abortion constitutional?

Summary of the Law for Lawyers and Teachers

A. Introduction
B. Marriage
  1. Constitutional Status
  2. State Restrictions Regarding Marriage
  3. Remnant of the Past—Common Law Marriage
  4. Contemporary Legal Issues: The Status of Cohabitation and the Prohibition Against Gay Marriages
    a. The Status of Cohabitation
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C. Divorce
  1. Fault-Based Divorce
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  4. Child Custody
D. Adoption
E. Birth Control and Abortion
F. Conclusion

6. Family Law

Cases For Students

A. THE RIGHT TO MARRY: *Loving v. Virginia* (1967)

NOTES:

Facts

In June, 1958, Mildred Jeter, a black woman, and Richard Loving, a white man, decided to get married. They were both residents of the state of Virginia. They later went to Washington, D.C., where they were legally married. Thereafter, they returned to Virginia to live as husband and wife.

Virginia laws prohibited marriages between persons of different races whether obtained in or outside the state. Mr. and Mrs. Loving were charged with criminally violating the laws and they pleaded guilty to the offense. The trial court judge suspended their jail sentence so long as they left the state and did not return. After moving to Washington, D.C., the Lovings appealed the trial court judgment on the basis that the Virginia laws were unconstitutional.

Issues for Discussion

1. Do citizens have a right to marry whomever they choose? Why?
2. What interests does a state have in regulating marital relationships?
3. What restrictions, if any, should a state be allowed to place on the entry of marriage? Racial restrictions? Religious restrictions? Age restrictions? Health restrictions? Why?
4. Should a state be allowed to prohibit marriages between persons of the same sex? Why?

Decision of the United States Supreme Court

State statutes that deprive citizens of the fundamental right to marry on the basis of racial discrimination are in violation of the Due Process Clause of the Fourteenth Amendment. The Court also held that the state statutes violated the Equal Protection Clause.

NOTES:

Reasoning of the Court

The Court regarded the deprivation of the fundamental right to marry as a violation of the Due Process Clause of the Fourteenth Amendment, which prohibits a state from depriving a person of life, liberty, or property without due process of law. The Court noted that the freedom to marry was one of the "basic civil rights of man" and an important personal right essential to a free society. Thus state statutes that deny this fundamental right on the unsupportable basis of racial discrimination infringe upon the liberty interests of citizens in violation of the Due Process Clause.

B. COHABITATION: *Marvin v. Marvin* (1976)

Facts

After meeting while making a film together in June, 1964, Ms. Michelle Triola, a night club singer, and Mr. Lee Marvin, an actor, decided in October, 1964 to begin living together without getting married. Shortly thereafter, Mr. Marvin purchased a house in which he and Ms. Triola lived together. According to Ms. Triola, she and Mr Marvin orally agreed that while they lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their individual or joint efforts. Also, according to Ms. Triola, part of the oral agreement was that she would be a companion, homemaker, and housekeeper for Mr. Marvin. Although Mr. Marvin admitted that he and Ms. Triola lived together, he denied that any oral agreement ever existed.

During the relationship, Mr. Marvin was employed as an actor in several successful movies. Ms. Triola was infrequently employed, instead accompanying Mr. Marvin on numerous trips and caring for the house. Mr. Marvin provided for Ms. Triola's living expenses while at home and while traveling together. All property acquired during the relationship was taken in Mr. Marvin's name.

In May, 1970, after a six-year relationship, Mr. Marvin told Ms. Triola that he would provide her limited financial support if she would leave his household. Ms. Triola did leave and Mr. Marvin provided her with the financial support until a dispute arose between them. Thereafter, Ms. Triola filed a suit against Mr. Marvin claiming that she was entitled to half of Mr. Marvin's property and financial support from him on the basis of the oral agreement between them at the beginning of their relationship. After hearing arguments from both parties, the trial court dismissed the suit, ruling that it was without legal merit.

Issues for Discussion

1. Is Ms. Triola entitled to any of Mr. Marvin's property or financial support after their relationship ended? Why?
2. If agreements between unmarried persons living together were enforced by the courts, would such enforcement of these agreements discourage marriage? Why?
3. Should a state have a public policy that favors marriage and disfavors cohabitation by unmarried persons? Why?
4. Suppose two gay people lived together and agreed to equally divide their property if their relationship ended. If the relationship did end, should a court enforce such an agreement? Why?

NOTES:

Decision of the California Supreme Court

NOTES:

Agreements between unmarried partners can be enforced by the courts so long as the agreement is not solely based on illicit sexual services. Courts should determine whether there is an express agreement between the unmarried partners or whether the conduct between the partners demonstrates an implied contract between the partners. Courts may also use any other equitable remedy to fulfill the reasonable expectations of the parties to a nonmarital relationship.

Reasoning of the Court

The court reasoned that adult, unmarried partners who voluntarily lived together were as capable as anyone in making contracts between themselves regarding their earnings and property rights. So long as the agreement between the partners was not solely to pay for the performance of sexual services, that is, a contract in the nature of prostitution, the courts should uphold such agreements between unmarried partners. The court based its opinion on the fact that many unmarried couples now live together as a way of modern life notwithstanding traditional moral considerations.

Just as in any other contractual relationship, the court stated that the reasonable expectations of the unmarried partners as to their property rights should be carried out. If the partners agreed to divide property upon separation, then courts should enforce such agreements as they do any other contract.

The court held that a variety of remedies would be available to the partner seeking to enforce an agreement with the other partner or seeking to obtain what was reasonably expected from the other partner. These remedies included a division of the jointly acquired property or recovery of compensation for homemaker services provided during the relationship.

C. CHILD CUSTODY: *Bezio v. Patenaude* (1980)

Facts

Brenda Bezio was the mother of one girl and was pregnant with another child. In 1974, she was experiencing complications with the pregnancy, so Ms. Bezio asked her friend, Ms. Magdalena Patenaude, to care for her daughter during the pregnancy. After the birth of the second child, Ms. Bezio continued to experience both emotional and physical problems, so she made arrangements with Ms. Patenaude to have custody of the children from time to time until her condition improved.

In 1976, Ms. Patenaude asked Ms. Bezio if she would allow her to become the legal guardian for the children so she could obtain medical care for them, and Ms. Bezio consented to the request. Thereafter, problems developed between Ms. Patenaude and Ms. Bezio concerning Ms. Bezio's visitation rights. In February, 1977, Ms. Bezio filed a petition in court to regain custody of her children. During one visit in July 1978, Ms. Bezio decided to take the children from Ms. Patenaude in Massachusetts to Vermont, where they stayed for over two years. Ms. Bezio was arrested for taking the children who were returned to the custody of Ms. Patenaude, their legal guardian.

Finally, during the court hearing on Ms. Bezio's petition to regain custody of her children, Ms. Bezio stated that she wanted the children to live with her while she was living with another woman in a lesbian relationship. Ms. Bezio contended that it would be wrong to deprive a natural parent of custody of her children unless it was shown that the parent was unfit. The judge ruled that the "environment in which [Ms. Bezio] proposes to raise the children, namely, a lesbian household, creates an element of instability that would adversely [a]ffect the welfare of the children." In deciding that Ms. Patenaude should retain custody of the children, the judge stated that since Ms. Patenaude had provided the children with an "excellent home," it was in the children's best interest to remain in her care.

Issues for Discussion

1. In a custody case, what factors should be considered in determining the "child's best interest?" How much weight should the judge give to the child's own views? Should children ever be able to make their own custody decisions?
2. Under what circumstances should a child be taken from the natural mother? When the evidence indicates that the guardian would provide a better home? Or only if the natural mother is "unfit"?
3. What makes a parent unfit? Should the sexual preference of a parent be considered in making this decision?

NOTES:

Decision of the Massachusetts Supreme Judicial Court

A natural parent will not be denied custody of his or her child unless that parent is unfit to further the child's welfare. A parent's sexual preference, in and of itself, is irrelevant to a consideration of his or her parenting skills.

Reasoning of the Court

In a custody determination between the natural parent of a child and a guardian, the court here stated a strong preference for the natural parent. The court found that such a preference creates normal family relationships and supports the integrity of the family. Custody by a guardian would only be considered where the natural parent was currently unfit to further the welfare of a child.

In this case, the court held that because Ms. Bezio was unable or unwilling to care for her children in the past did not support a conclusion that she was presently unfit to regain custody. The court also held that Ms. Bezio's sexual preference did not render her unfit as a parent based upon social science evidence submitted at the hearing, which indicated that the sexual preference of a parent had no detrimental impact on children.

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D. ADOPTION: *Doe v. Kelley* (1980)

NOTES:

Facts

[In this case, fictitious names were given to the parties to protect them from adverse notoriety.]

Mr. and Mrs. Doe were husband and wife. Mrs. Doe was biologically incapable of bearing children. Mr. and Mrs. Doe proposed to Mary Roe that Mary conceive a child with Mr. Doe by means of artificial insemination administered by a physician. As part of the proposal, the Does would take custody of the child after his or her birth, and Mary would consent to the adoption of the child by the Does. Also, Mary would receive $5,000 plus medical expenses, from the Does for surrendering custody of her child to the Does and for consenting to the adoption.

Before the plan was carried out, the local prosecutor and state attorney general brought criminal proceedings against the Does and Mary Roe for violating a Michigan statute that prohibited a person from offering, giving, or receiving any money or other item of value in connection with an adoption except where approved by a court. The Does and Mary Roe sued to have the statute declared unconstitutional and to stop the criminal proceedings.

Issues for Discussion

1. What problems could possibly arise if the Does and Ms. Roe were allowed to carry out this arrangement?
2. In this case, would your decision be affected if the Does were only to pay for Ms. Roe's medical expenses attributable to childbirth?
3. What alternatives are available for people who want to have a child but are physically incapable of conceiving a child?
4. Should the constitutional right to privacy regarding family relationships include the right to adopt a child?

Decision of the Wayne County, Michigan, Circuit Court

The right to adopt a child based upon payment of $5,000 is not a fundamental right within the constitutional right of privacy under the Due Process Clause. Furthermore, the state statute is not so vague as to violate the Due Process Clause.

Reasoning of the Court

A state statute that prohibits conduct in terms so vague that a reasonable person must guess as its meaning is in violation of the Due Process Clause of the Fourteenth Amendment because such a statute may trap an innocent person without fair warning and allow for arbitrary enforcement. In this case, the judge found that the state statute was sufficiently specific to give fair notice to reasonable persons regarding the meaning of "money or other item of value" in connection with an adoption.

The judge also held that the right to adopt a child based upon payment of $5,000 was not a fundamental right because the parties in this case wanted to take advantage of the protective aspects of the adoption laws without complying with the prohibition on commercialism in adoption matters. Furthermore, the judge said that a state has important interests in regulating adoption procedures. One such interest was to prevent commercialism from affecting a mother's decision to consent to the adoption of her child. The judge referred to this prohibited act as "baby bartering" involving the buying and selling of a child. The judge ruled that such a practice was inherently against the state's public policy.

NOTES:

E. ABORTION: *H. L. v. Matheson* (1981)

NOTES:

Facts

H.L. [the abbreviation was used to protect the party from adverse notoriety] was an unmarried, 15-year-old girl living with her parents in Utah and dependent on them for her support. In the spring of 1978, H.L. discovered she was pregnant. She discussed her condition with a social worker and a doctor. The doctor advised H.L. that an abortion would be in her best medical interest and avoid possible hazardous complications in connection with her pregnancy. However the doctor refused to perform the abortion without first notifying H.L.'s parents as required by a Utah statute.

The Utah statute provided that in considering a possible abortion, the doctor shall "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor . . . " Both H.L. and her social worker believed that H.L. should proceed with the abortion without notifying her parents because of personal reasons. H.L. sued to have the state statute declared unconstitutional and to stop enforcement of the statute by state officials.

Issues for Discussion

1. Does the Utah statute violate H.L.'s constitutional right of privacy? Why? What interests, if any, does the state have in enacting the notification requirement? Would your decision be affected if it was proven that H.L. was mature and independent of her parents?

2. Should the constitutional right of privacy be extended to a woman's decision whether to terminate her pregnancy? Why? Should Fourteenth Amendment protection concerning "persons" be extended to the unborn? Who should determine when the unborn are capable of independent life? The individual? Doctors? State legislatures or Congress? The Supreme Court?

Decision of the United States Supreme Court

A state statute that requires doctors to "notify, if possible," the parents of an unmarried female who seeks an abortion does not violate the constitutional right of privacy when applied to an immature minor dependent on her parents.

NOTES:

Reasoning of the Court

Chief Justice Burger, in writing the majority opinion, emphasized the point that this case is distinguished from cases involving mature minor females who no longer depend on their parents for support. The Court had previously held that a state statute requiring prior parental consent before a mature, female minor could obtain an abortion was an unconstitutional burden on the minor's right of privacy in deciding whether to terminate her pregnancy. Since this case involved parental notification and not parental consent, Chief Justice Burger held that the statute as applied to immature and dependent female minors was justified by important state interests (*i.e.*, the statute would protect adolescent females and the integrity of the family.) According to the Court, the state reasonably determined that parental consultation was in the best interest of the immature minor in deciding whether to terminate her pregnancy. Also, the statute would provide an opportunity for parents to give essential medical and other information to a doctor. The Chief Justice stressed the importance of such information, considering the serious and lasting consequences of an abortion when the patient is immature.

Justice Marshall wrote a dissenting opinion joined by two other justices. He argued that the statute unconstitutionally burdened the minor's right of privacy in deciding whether to terminate her pregnancy. The Justice found that the statute did not say anything that would encourage parents to provide information to the attending doctor. Furthermore, he found that the statute did not specify the kind of information that would aid a doctor in his or her medical decisions. Since consultation between the minor and her parent was not and could not be required, the Justice could not see how the statute aided the minor, especially where the parent-minor relationship was poor.

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

Family law, sometimes more specifically labeled domestic relations, is basically concerned with state regulations affecting familial arrangements, or the state's attempt to resolve conflicts within the family. No serious commentator would dispute the fact that over the last 20 or 30 years societal ideas about the American family have changed dramatically. Because of this continuing trend, the status of the law in this area remains in a state of flux. Changing opinions about marriage, divorce, and the family itself, along with fresh ideas about and among women and young people, have generated fundamental challenges to formerly static notions about family relationships. Many times these issues find their way into state legislative debates or court decisions. The purpose of this section is to briefly examine the role of the law in dealing with these challenging issues as they pertain to family relationships.

B. MARRIAGE

In the United States, the states have derived certain, limited powers to regulate the marital relationship with respect to its entry, status, conditions, and termination. This authority is based on the traditional proposition that the state has an interest in the civil and harmonious stabilization of relationships between men and women. Since this relationship may include the bearing of children, it was recognized early that such stability was a necessity for civilization or society would perish.

1. Constitutional Status

What limitations have been placed on state actions regarding marital relationships? In *Loving v. Virginia,* 338 U.S. 1 (1967) (included in Cases for Students), the Supreme Court invalidated a Virginia statute that prohibited marriage between people of different races. Although most of the Court decision dealt with equal protection issues, the decision contained important language outlining an individual's right to marry the person of his or her choice:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Supreme Court recognized a right of privacy protecting the marital relationship from state interference. Although the Justices disagreed about the origin of the right of privacy, a majority did agree that this right protected the marital relationship from state interference regarding the use of contraceptives. As to the right of marital privacy, the Court said,

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

What can be gleaned from this sampling is that constitutional protection will be afforded to an individual's right to marry and a right of privacy within the marital relationship itself. If a state action infringes upon these rights, the state must be able to justify such interference based upon a compelling interest accomplished by the least restrictive means available. These considerations should be kept in mind in regard to the discussion below.

2. State Restrictions Regarding Marriage

In law, marriage is viewed as a contractual relationship of a special nature. Because of its personal and intimate nature, the marital relationship is different from any other contractual arrangement. However, just as in any other contractual relationship, the status of marriage imposes certain rights and obligations on the parties involved.

From the civil contract of marriage, the states derive certain powers to regulate it. Many times, the state-imposed formalities regarding marriage are in the nature of restrictions. All states require the issuance of a marriage license by a prescribed public official before the performance of the marriage ceremony. Most states also require a blood test or physical examination as a condition for obtaining the marriage license to protect marital partners and curtail the spread of diseases. Many states also require solemnization of marriages. Under these laws, marriages may be solemnized by ministers, priests, rabbis, or such public officials as a justice of the peace.

Most states impose two other restrictions on persons seeking to enter into marriage. First, states generally prohibit marriage between persons closely related to each other by blood or marriage. The Uniform Marriage and Divorce Act (hereinafter UMDA), a model act adopted by a national commission on uniform state laws and increasingly being recognized by many states, prohibits marriages between an ancestor and a descendant, a brother and a sister, an uncle and a niece, or an aunt and a nephew. UMDA § 207. Partly based on biological evidence, such laws have a policy seeking to prevent the birth of genetically weak chldren and reducing tensions within the family.

Second, all states prescribe an age below which an individual may not marry. Typically, state statutes are like UMDA §§ 203 and 205, which provide that the marriageable age is 18, or 16 if both parties have the consent of their parents, guardians, or court approval where the party has no parent capable of consenting, or whose parent or guardian has not consented. The policy behind such age limits is to promote marital stability and prevent marriage between presumably immature people. Formerly, many states prescribed lower age limits for females on the questionable ground that females physically and mentally mature faster than males. However, almost all states have moved away from this policy due to its doubtful validity under the Equal Protection Clause, and states now have established age limits equally applicable to males and females.

3. Remnant of the Past—Common Law Marriage

From old English law, some American states recognized an informal marital arrangement known as common law marriage. The hardship of traditional life made recognition of the common law marriage a necessity. Common law marriages were legally recognized marital relationships entered into without a civil or ecclesiastical ceremony.

Today, 13 states and the District of Columbia still recognize common law marriages. Usually, a common law marriage will be recognized in these jurisdictions if it is established that the marital partners agreed to enter into marriage, represented themselves to the public as husband and wife, and cohabited as husband and wife. Also, it is usually required that the partners live under these conditions for several years. If these requirements are met, the law of these jurisdictions will treat the partners as being validly married and subject to the same rights and responsibilities incident to marriage.

4. Contemporary Legal Issues

a. The Status of Cohabitation

Changing social attitudes have given rise to the widespread practice of cohabitation. It is reported that in 1970, eight times as many unmarried couples lived together as in 1960, and in 1979, six times as many unmarried couples lived together as in 1970, and this trend is growing. *National Law Journal,* Vol. I, No. 31, (April 16, 1979) p. 14. This significant development has had a profound impact on society and the institution of marriage. Fornication laws, although rarely enforced in modern times, proscribed sexual partnerships between unmarried persons. In response to changing social attitudes, most states now have abolished this statutory impediment to such relationships. Furthermore, the courts have currently become the forum to determine other legal implications of cohabitation. As a result of these developments, the following issues require resolution by the courts. Are there any rights and duties between unmarried partners living together? Is the cohabiting relationship analogous to any contractual relationship? If so, should the courts enforce any obligations between cohabiting partners upon separation?

The California Supreme Court dealt with these issues in the highly publicized case of *Marvin v. Marvin,* 18 Cal. 3d, (1976) (included in Cases for Students), where the plaintiff, Michelle Triola Marvin, appealed the dismissal of her suit against actor Lee Marvin to enforce what she termed a contractual relationship between them. Over a seven-year period, Ms. Marvin lived with Mr. Marvin without marrying. During this period, she cared for their mutual household and was his companion at home and while traveling, but all property acquired during the period was taken in his name.

On appeal, the California Supreme Court held that lower courts should enforce express contracts between unmarried partners so long as the contract is not for illicit sexual services. The court reasoned that cohabiting adults should have the same capacity to make contracts respecting their property as did any other person. Additionally, the court declared that in the absence of an express contract, lower courts should look at the conduct of the parties to determine whether such conduct demonstrated an implied contract, agreement, or understanding between them. Accordingly, lower courts were empowered with the authority to utilize numerous equitable remedies to achieve equity between the partners.

On remand to a California lower court, it was held that Ms. Marvin had not proved the existence of an agreement between her and Mr. Marvin, but she was allowed an alimony-like award for her economical rehabilitation in the amount of $104,000. 5 *Family Law Reporter* (BNA) 3077 (April 24, 1979). More recently, a California appeals court deleted the "rehabilitative award" but affirmed the principles of the lower court decision. Court of Appeals of the State of California, Second Appellate District, Division Three, 2D Civ. No. 59130 (August 11, 1981).

It has been reported that 17 states have followed *Marvin* to some extent and four states have rejected it. *National Law Journal, supra.* In *Carlson v. Olson,* 256 N.W. 2d 249 (1977), the Minnesota Supreme Court held that a cohabiting partner of 21 years, who with her partner held themselves out as husband and wife and raised a son, was entitled to one-half of the property acquired over those years based on an implied contract between the partners. (Is this a rebirth of common law marriage? Some states have employed the common law marriage doctrine to justify *Marvin*-type remedies in the modern cohabiting relationship. *See, McCullon v. McCullon,* 410 N.Y.S. 2d 226 (1978).) However, the Georgia Supreme Court in *Rehak v. Mathis,* 239 Ga. 541 (1977), rejected all *Marvin*-type remedies even though an unmarried woman had cohabited with and cooked, cleaned, and cared for her unmarried male partner for some 18 years while also making partial payment for their mutual home. The Georgia Court denied all relief to the woman finding that the relationship was illicit; therefore, any agreement was unenforceable as against public policy. Contrary to this Georgia ruling, it seems that most courts will follow the trend to enforce some explicit and implicit obligations between cohabiting partners.

b. Prohibition Against Gay Marriages

Does a state have an interest in prohibiting persons of the same sex from marrying? Why might two members of the same sex wish to marry? Obviously, these questions touch upon the personal interests of individuals. But when the state prohibits certain personal activities among individuals because of their lifestyle preferences, legal issues are brought into question.

There is little doubt that public attitude toward homosexuality has substantially changed over the last few years.

Many issues concerning gay people have been litigated in the courts, some regarding family law as to the rights of gay people in child custody matters. For instance, in *Bezio v. Patenaude,* 410 N.E. 2d 1207 (1980) (included in Cases for Students), a Massachusetts court held that a mother's sexual preference, by itself, was irrelevant to a consideration of her parenting skills, and in *Armanini v. Armanini,* 5 *Family Law Reporter* (BNA) 2501 (1979), a New York court similarly held that a mother's sexual preference in itself, did not make her unfit to retain custody of four minor children. Yet no state has legally recognized the marriage between two persons of the same sex.

In *Baker v. Nelson,* 291 Minn. 310 (1971), the Minnesota Supreme Court rejected the constitutional challenge of two males who sought a marriage license which was denied by a court clerk solely because they were of the same sex. The petitioners' challenged the clerk's action claiming that it denied them the fundamental right to marry and the equal protection of the laws. The court found that a state restriction upon the right to marry as to the sex of the parties did not irrationally or invidiously discriminate against the petitioner because the institution of marriage could by definition, be reserved for members of the opposite sex. The court ruled that any comparison to *Loving, supra,* was inappropriate since that case involved marital restrictions based upon race rather than "the fundamental difference in sex." The U.S. Supreme Court rejected the petitioners' appeal, finding no substantial federal issues involved in the lower court decision, 410 U.S. 810 (1972).

Implicit in *Baker* is a notion that it is rational to allow the states to reserve marriage for members of the opposite sex. Is it rational to reserve *Marvin*-type remedies, admittedly based on contract law, to cohabiting heterosexual partners but deny relief to cohabiting gay partners? Some courts are facing this issue in current litigation.

C. DIVORCE

Under traditional English law and the Church's strong influence, the institution of marriage was viewed as being divine and thus, indissoluble by mortals. Divorce, as it is known today, was unobtainable except by special act of Parliament; an annulment could be obtained in limited instances, but this doctrine declared that no valid marriage between the parties had ever existed. Much of this hostility to divorce, grounded in religious doctrine, permeated American law. Although slowly disappearing in American law today, only serious and particular fault-based conditions within a marriage were allowed as the legal basis to dissolve a marriage.

1. Fault-Based Divorce

In order to obtain a fault-based divorce, one of the marital partners had to prove that the other partner was in some way at fault in bringing about the marital breakdown based on a statutorily-prescribed ground. These fault-based grounds for divorce usually included adultery, cruelty (physical and mental), desertion, or abandonment, in addition to insanity, criminal conviction, or habitual drunkenness. Under a fault-based divorce system, a court could only grant a divorce upon proof by one of the marital partners that the other partner was guilty of the wrongful conduct.

The fault-based divorce process was attacked on several fronts as an unrealistic anachronism in regard to the modern marital relationship. The most frequent criticism was that it was unrealistic to ascribe fault to one marital partner and innocence to the other partner concerning the marital failure. Another criticism was that the enumerated grounds for divorce in state laws were too limited in expressing the complexity of a marital failure. In tandem with this criticism was the argument that it was both unfair and unreasonable to force people to remain married where a stipulated ground for divorce could not be proven even though the marriage had completely failed. It was also argued that a finding of wrongful conduct on the part of divorced parents would adversely affect the relationships with their children.

Many courts concurred in these criticisms and began a practice of de-emphasizing or ignoring fault-based grounds for divorce by granting divorces upon proof of a serious marital failure. By the late 1960's, state legislatures began efforts to reform divorce laws through the adoption of "no-fault" divorce laws. Today, in only two states—Illinois and South Dakota—are the divorce statutes without at least one no-fault ground for divorce. *Divorce in the Fifty States: An Overview as of August 1, 1980,* Doris Freed and Henry H. Foster, 6 *Fam L. Rep.* (BNA) 4043.

2. No-Fault Divorce

State legislation regarding divorce defines the no-fault divorce grounds in a variety of ways. Most states have adopted the concept of "irretrievable breakdown in the marital relationship" as either the sole ground or no-fault ground in addition to the traditional grounds. Some states use the similar concept of "incompatibility" as the basis for a no-fault divorce, meaning that the marital partners can no longer live together in harmony because of their irremediable differences. Another approach used in other states is that the marital partners have "lived separate and apart" for a prescribed period of time, such periods usually being from one to three years. Under this approach, a divorce is allowed after the marital partners have lived separate and apart during the period either voluntarily or pursuant to a separation decree.

Being the major no-fault basis for divorce today, "irretrievable breakdown" is explained in UMDA §305 as follows:

> (a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.
>
> (b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise

> to filing the petition and the prospect of reconciliation, and shall:
>
> (1) make a finding whether the marriage is irretrievably broken, or
>
> (2) continue the matter for further hearing not fewer than 30 nor more than 60 days later; or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.
>
> (c) A finding of irretrievable breakdown is a determination that there is no reasonable prospect for reconciliation.

The 30 to 60 day period in the Uniform Act is known as a "cooling off" period which gives the parties a final opportunity to reconcile differences and preserve their marriage. Such periods are commonly provided for in state divorce laws along with the option for marital counseling.

In practical operation, the faultless divorce statutes have been interpreted as removing most of the major state-imposed impediments to divorce. Considering the historical, social, and legal framework concerning divorce, the policy shift toward no-fault divorce will have a far-reaching impact on the institution of marriage and the state's role in regulating the marital relationship.

3. Financial Aspects of Divorce

a. Spousal Support

The movement toward equality of the sexes has had its most significant influence on this area of family law. Women as well as men have obtained beneficial results in the trend toward equal treatment of the sexes. Alimony was formerly viewed as the monetary allowance which a husband was compelled to pay to his former wife for her support. Under the fault concept of divorce, alimony was a form of compensation to the wronged spouse—denied or decreased if the wife was guilty of marital misconduct, or punitive in orientation if the husband was guilty of marital midconduct. Substantial changes have occurred in state laws regarding spousal financial obligations upon termination of the marriage.

In *Orr v. Orr,* 440 U.S. 268 (1979), the Supreme Court ruled that state statutes imposing alimony obligations on husbands but not wives violated equal protection. The Court found that such a statutory gender classification did not serve important governmental objectives and was not substantially related to the achievement of such objectives. The Court rejected the state's assertions that sex was a useful indicator of the financial need of a divorced wife. Justice Brennan, writing for the majority, noted that such stereotypic devices in the name of "protecting" women could not be utilized when they could make an individual determination of need without relying on sex classifications. He said, "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas."

Notwithstanding *Orr,* most states had already removed all gender-based classifications from their marriage and divorce laws. Furthermore, most states have now minimized the importance of marital misconduct in awarding alimony by expressly excluding it from consideration or not mentioning it within the criteria for alimony awards. Also, the term "alimony," with its common law sexual bias as an allowance for wives only, has been replaced in most state statutes with the term "maintenance." Under the concept of maintenance, most states provide a statutory criteria for courts to use in determining the level of maintenance which generally recognize such factors as the length of the marriage, the age and health of the parties, the educational level of each spouse, the homemaker services and contributions to the career of the other spouse (an important change that accounts for the contributions in homemaking and child care by homemaker-spouse), the earning capacity of the spouse seeking maintenance, and the needs of the spouse seeking maintenance. Finally, it should be mentioned that the courts are beginning to base maintenance allowances on a concept of "rehabilitative" support rather than permanent support in appropriate cases. The concept of rehabilitative support is based on providing economic support to a spouse only until such spouse can provide for himself or herself, while considering the earnings or earning potential for the spouse seeking maintenance. In *Ferdon v. Ferdon,* 5 *Fam. L. Rep.* (BNA) 2243 (1978), a Florida court expressly approved of an allowance of rehabilitative support only to a divorced wife noting that she was college-educated and capable of future employment.

b. Property Division

States have a variety of statutory formulas to distribute the property of the marital partners upon divorce. Most state laws require an "equitable distribution" of the marital property upon divorce. The marital property is usually the property accumulated during the marriage although some states allow property acquired before the marriage to be considered as marital property. Various means are employed by state laws to attain an equitable distribution of the marital property. Some state laws set out criteria similar to the factors considered in determining maintenance allowances, and the courts distribute the marital property based on these criteria. Other states either require an equal split of the marital property or leave it to the broad discretion of the courts to determine an equitable distribution.

In nine United States jurisdictions, "community property" laws originating from the civil law are recognized. The rationale for community property laws is that the marital property is acquired from the efforts of both spouses and, therefore, should belong to both parties upon divorce. This doctrine avoids the inequity of the common law notion that the marital partner with title to the property, usually the husband, should remain owner upon divorce. In operation, community property laws are similar to equitable distribution so that in some community property states the marital property may be distributed in a manner the court finds just.

c. Child Support

Traditionally, most state laws provided that the father had the primary duty to support the children of the marriage upon divorce. Today, with the movement toward equality of the sexes, most state statutes impose the obligation of child support on both parents. Courts are to apportion child support between parents according to their financial abilities. In many states, a statutory criterion is used in determining the level of child support based on such factors as the financial resources and needs of the child, the custodial parent, and the noncustodial parent; the standard of living the child would have enjoyed but for the divorce; and the physical and emotional condition of the child.

4. Child Custody

When parents are divorced, court involvement is necessary to determine who the child or children shall live with. Separation of the parents and custody determinations affect the emotions and relationships between child and parent as well as between parents themselves. Because of the serious personal nature of child custody issues, they have been an area of the law rife with conflicts.

In every state, custody decisions upon divorce are to be determined in accordance with the "best interests of the child." Although this standard is an obviously worthwhile objective its nebulous character militates against an easy and simple determination of what is best for the child. In an attempt to crystallize the "best interest" standard, many state statutes have copied from UMDA §402 listing the following factors to guide the courts in determining what is best for the child: the wishes of the parents as to custody; the wishes of the child as to his or her custodian; the interaction and interrelationship of the child with his or her parents, siblings, and any others who may significantly affect the child's best interest; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved.

Although most state statutes account for the child's wishes in custody decisions, some states have even gone further in allowing an older child's choice of the custodial parent to be controlling unless the court finds the parent unfit. The rationale behind such legislation is that mature children are able to determine their own best interests. Another major change in the law regarding child custody is the desexification of statutory language and custody determination. The majority of states have equalized parental rights to child custody. Many courts formerly favored giving custody of children to the mother, especially in contested cases, based on the stereotypic notion that women were more capable of caring for children. An explicit example of this bias is the "tender years" doctrine. Now rejected in most states, the doctrine provided that a mother should be preferred in custody determinations involving children of "tender"—*i.e.,* infant—years. Although old norms change slowly, more and more courts have been granting custody of children to fathers when it is determined that it is in the best interests of the children. *Devine v. Devine* 5 *Fam. L. Rep.* (BNA) 2395 (1981).

In another major change, the Massachusetts Supreme Judicial Court held that the fact that a mother was living in a lesbian relationship was "irrelevant to a consideration of her parenting skills" in a child custody dispute, *Bezio v. Patenaude, supra.* Many courts have been disinclined to accept this position instead holding that the sexual preference of a parent may be a factor to consider in child custody decisions.

Finally, a novel approach regarding child custody has been adopted in some states where both parents will be awarded custody of the children. Under a joint custody arrangement, usually agreed to by the parents, the child or children are allowed to live part of the time with one parent and part of the time with the other parent. Although joint custody is statutorily authorized in only a few states, the trend seems to be growing. In the majority of states where there is no joint custody, the noncustodial parent is usually entitled to visit the children regularly, and in many states, this visitation right has been extended to grandparents.

D. ADOPTION

Adoption is the legal procedure by which the status of parent and child is conferred upon persons who previously had no such relation. The adoptive parents incur all parental rights and responsibilities with regard to the adopted child, and the parental rights of the natural parents or legal guardians are terminated. Persons seeking to adopt a child usually begin by contacting an adoption placement agency. Arrangements for the adoption of a child are made through a state licensed and regulated public or private agency having the responsibility of placing children. Such agencies make a thorough and detailed investigation regarding the suitability of the adoptive parents and the background of the child. State statutes usually provide that the adoption is to be made only in the child's best interest and upon court approval granted in the adoption proceedings.

The Uniform Adoption Act §§ 2-3 provides that any individual may be adopted (child or adult) and allows an unmarried adult to adopt. In most instances, the consent of the natural mother and father of the child to be adopted is required. Some statutes also require the consent of the child when he or she is above a prescribed age. Usually, the natural parents of the child to be adopted may withdraw their consent to the adoption *before* entry of the decree of adoption and retain parental rights over the child. This limited right is usually conditioned upon court approval. For a long time, many state adoption statutes only required the consent of the natural mother of an illegitimate child about to be adopted. In *Caban v. Mohammed,* 441 U.S. 380 (1979), the Supreme Court held that a New York statute that required the consent of the mother, but not the father, as a prerequisite to adoption of an illegitimate child was sex discrimination in violation of equal protection.

An interesting case was recently decided by a Michigan lower court. In *Doe v. Kelley,* 6 *Fam. L. Rep.* (BNA) 3011 (1980) (included in Cases for Students), Mr. and Mrs. Doe proposed to have Ms. Roe conceive a child through artificial insemination administered by a doctor. After the birth of the child, the Does were to have custody of the child, and Ms.

Roe was to consent to adoption and receive $5,000 plus medical expenses. All three parties were charged with violating two state laws which prohibited the payment of money without court approval in adoption proceedings. The Does sought to have the two state laws declared unconstitutional. The Michigan court ruled that the adoption of the child based upon the payment of money was not within the constitutional protection of the right of privacy and was not a fundamental personal right. The court reasoned that the parties could not simultaneously abrogate the statutes and then utilize the protection of the same adoption laws. Furthermore, the court found the parties' actions violative of the public policy against "baby bartering."

E. BIRTH CONTROL AND ABORTION

The courts have been in the center of the controversy surrounding contraceptives and abortion. The legal controversy began with the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which struck down a Connecticut law forbidding the use of contraceptives. The Court enunciated a constitutionally protected right of marital privacy and ruled that the state law unconstitutionally intruded upon that right. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended the constitutionally protected right of privacy to all individuals, whether married or single. The Court held that a Massachusetts law prohibiting distribution of contraceptives to single persons intruded upon their constitutionally protected right of privacy. In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court found that a New York statute, which prohibited the distribution of any contraceptive to a minor under age 16, imposed an unconstitutional burden on an individual right of privacy in deciding whether to bear children because there was no compelling state interest justifying the prohibition.

It was this right of privacy that protected the woman's right to terminate her pregnancy in *Roe v. Wade*, 410 U.S. 113 (1973). In the *Roe* decision, the Court held that the Texas criminal abortion statute violated a woman's right of privacy in deciding whether to terminate her pregnancy. The Court said that although a state could not deny this right, it did have an interest in protecting the pregnant woman and the "potentiality" of human life. Therefore, these mandates were laid down regarding the state's interest:

> (a) During the first trimester of pregnancy, the abortion decision must be left to the pregnant woman and her doctor
>
> (b) Following the end of the first trimester of pregnancy, the state may impose reasonable regulations on abortion procedures to protect the pregnant woman
>
> (c) Subsequent to viability, the state may if it chooses, regulate or proscribe abortion except where necessary to preserve the life or health of the mother.

In *Roe*, the Court expressly held that the Fourteenth Amendment language concerning "persons" did not apply to the unborn. Nevertheless, many questions were left unanswered by *Roe*. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court struck down a Missouri law that required the consent of a husband, in the case of a married woman, and of the parents, in the case of an unmarried women under age 18, in order to effectuate an abortion during the first trimester of pregnancy. The Court noted that the abortion decision was solely the decision of the pregnant woman and her doctor during the first trimester.

However, in *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977), the Court ruled that state or local governments are not constitutionally required either to pay the cost of nontherapeutic abortions for women who cannot otherwise afford them or to provide abortion services in city hospitals that provide such services for childbirth. These limitations on the constitutionally protected right to make the abortion decision have been criticized on the basis that such limitations practically deny poor women their constitutional rights. Nevertheless, a federal law prohibiting use of federal funds for abortions except where necessary to save the pregnant woman's life or to terminate a pregnancy caused by rape or incest was upheld against a constitional attack in *Harris v. McRae*, 448 U.S. 297 (1980). The Court reasoned that the Due Process Clause, from which the right of privacy originates, does not require that the federal government affirmatively fund abortions; rather, due process restricts the federal government from interfering with the exercise of the right of privacy.

Recently, in *H.L. v. Matheson*, 450 U.S. 398 (1981), (included in Cases for Students), the Court upheld a Utah statute requiring a doctor to notify the parents of a minor female seeking an abortion. The Court carefully distinguished this situation from the prohibited practice of requiring parental consent so that a minor female may obtain an abortion. The Court said that the statute involved here protects the minor female and family integrity.

F. CONCLUSION

The primary observation that must be made regarding family law is the dramatic impact of social attitudes on the law. As evident from the summary above, the courts have been and will probably continue to be quite responsive to the social change in attitudes about the family and family relationships. As the law continues to recognize new and liberalized ideas about marriage, divorce, and the family, the period of change both socially and legally will continue.

7. Consumer Law

Cases for Students

A. Defective Products and Limitations on Warranties
Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960)
Is a manufacturer or seller of an automobile liable if someone is injured because the automobile is not fit for ordinary use?

B. Unconscionability: Unfair Commercial Transactions
Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (1965)
Should courts enforce a contract written by the seller that gives him the right to take back all items purchased by a consumer until all items are fully paid?

C. Gathering Information About the Consumer for Credit or Insurance Purposes
Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269 (1974)
What are the duties of a consumer reporting agency in gathering information about a consumer?

D. Abusive Collection Practices
Duty v. General Finance Co., 273 S.W. 2d 64 (1954)
Is a creditor or collection agency liable for damages when they engage in collection practices that result in mental anguish or physical injuries to the debtor?

E. Retaking the Goods Upon Default
Fuentes v. Shevin, 407 U.S. 67 (1972)
Is a state law that allows a creditor to seize a debtor's property before the debtor has notice and an opportunity to be heard constitutional?

Summary of the Law for Lawyers and Teachers

A. Introduction

B. Buying or Leasing Goods and Services
1. Defective Products
2. Limitations on Warranties
3. Unfair and Deceptive Advertising
4. Unconscionability
5. Home Solicitation
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C. Paying for Goods and Services
1. Cash
2. Credit
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D. Collecting Consumer Debts
1. Informal Debt Collection
2. Attachment
3. Garnishment
4. Replevin and Repossession

E. Consumer Rights to Redress Grievances

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7. Consumer Law

Cases for Students

A. DEFECTIVE PRODUCTS AND LIMITATIONS ON WARRANTIES: *Henningsen v. Bloomfield Motors, Inc.* (1960)

Facts

On May 7, 1955, Mr. and Mrs. Henningsen visited Bloomfield Motors, a Plymouth automobile dealer, to look at new cars. Mr. Henningsen told the dealer that he wished to purchase a car as a gift for his wife. Mrs. Henningsen chose a new Plymouth sedan, and Mr. Henningsen purchased it by signing his name on a one-page preprinted purchase order.

The front of the purchase order form contained blanks to be filled in with a description of the car purchased, included accessories, and financing arrangements. In different and smaller type near the bottom of the form, one paragraph stated the signer of the form agrees that the front and back of the form contains all the promises made between the buyer and seller. The next paragraph, just above the space for the buyer's signature, stated that the signer had read and agreed to the matter printed on the back of the form "as if were printed above my signature."

On the back of the form and in fine print, a paragraph near the bottom of the page stated,

> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective . . .

This paragraph also stated that the above warranty was the only warranty that would be honored by the manufacturer or the dealer. The dealer never called Mr. Henningsen's attention to these paragraphs on the front or back of the form nor did Mr. Henningsen read these paragraphs.

Mrs. Henningsen picked up the car on May 9, 1955. The owner service manual was in the car, and the manual listed the same warranty protection quoted above except that the term "dealer" replaced the term "manufacturer." Mrs. Henningsen drove the car for 10 days then on May 19, 1955, while driving at about 20 miles per hour she heard a loud noise from the bottom of the car that sounded as if something had cracked. The steering wheel spun around, and the car veered sharply to the right crashing into a brick wall. Mrs. Henningsen suffered personal injuries as a result of the accident.

An insurance inspector who examined the car stated that something went wrong with the steering mechanism of the car as a result of a mechanical defect or failure.

Issues for Discussion

1. Should auto makers be able to sell cars without a warranty? Should they be able to limit warranties any way they wish?
2. Why would a manufacturer or seller give a warranty to a buyer? Should warranties always be in writing?
3. Should a manufacturer or seller of products who gives warranty protection to a buyer be able to limit that warranty protection in any way? Why or why not? If so, how should the manufacturer or seller bring such limitations to the attention of the buyer?
4. Why might some written parts of a contract be in small print or be on the back of the contract form?
5. When a manufacturer makes or a seller sells a new car, do either parties impliedly promise without putting it in writing that the car will not break down in ten days?
6. Should Chrysler Corporation (the manufacturer) or Bloomfield Motors (the seller) be held responsible for Mrs. Henningsen's personal injuries resulting from the accident?

NOTES:

Decision of the New Jersey Supreme Court

A manufacturer or seller of a car will be held responsible for personal injuries resulting from the fact that the car is not fit for ordinary use. and any attempt to limit this responsibility for personal injuries is void as a matter of public policy.

NOTES:

Reasoning of the Court

In consumer law, a warranty is a promise concerning the product which imposes a duty on the party making the promise to fulfill it. In many cases, the law imposes an implied warranty of merchantability meaning that the seller promises that the product is fit for ordinary use.

In this case, the court ruled that a manufacturer or seller should be held responsible for the personal injuries arising from a violation of this implied warranty when their products are unfit or defective. The court reasoned that a car manufacturer or seller violated a duty owed to the public when their unfit or defective product caused physical injuries to a person.

Here, the manufacturer and seller attempted to exclude (disclaim) the protection of the implied warranty of merchantability by offering an express warranty in lieu of the implied warranty. Unlike the implied warranty which is imposed by law, an express warranty is a promise concerning the product directly made by seller. In this case, the court nullified the disclaimer because the buyer had no bargaining power concerning the warranties in the preprinted contract supplied by the seller and, at no time during the transaction, was the buyer fully informed about the disclaimer of the implied warranty or the limited express warranty.

B. UNCONSCIONABILITY: UNFAIR COMMERCIAL TRANSACTIONS: *Williams v. Walker-Thomas Furniture Co.* (1965)

Facts

Ms. Williams was a single parent of seven children who received public assistance to help support her family. Over a five-year period, Ms. Williams had purchased several household items on a special installment plan from Walker-Thomas Furniture Company.

Every time Ms. Williams made a purchase from the Walker-Thomas Company under the special installment plan she would sign a preprinted form contract that said the store was leasing the purchased item for a monthly rental payment. In very complicated, legal language, the contract explained that the Walker-Thomas Company would be the legal owner of all items ever purchased until the monthly payments for all items previously purchased had been paid. Thus, as long as Ms. Williams owed any money to the store, everything still was the property of the store no matter how much money had been paid on items previously purchased. The contract also provided that if the purchaser failed to make monthly payments then the store could take back all items previously purchased.

On April 17, 1962, Ms. Williams purchased a stereo set from the store under the special installment plan. Before this purchase, she owed the store $164.00 for all prior purchases. Ms. Williams had already paid $1,400.00 for all previously purchased items. Soon after purchasing the stereo set, Ms. Williams failed to make further payments on the special installment plan, and the store went to court for a court order to take back all items purchased since 1957.

Issues for Discussion

1. Was the store's special installment contract fair? Why?
2. Should the store be allowed to take back all items purchased under the special installment contract?
3. Suppose Ms. Williams said she never read any of the contracts each time she made a purchase. Should she still be obligated under each contract? Should purchasers be freed of contract responsibilities if they do not read their contracts? Under what special circumstances, if any, should Ms. Williams be relieved of the obligation?
4. If Ms. Williams wanted to contest the store's actions, where could she go?

NOTES:

Decision of the United States Supreme Court

A contract that gives one party no real bargaining power and which is unreasonably favorable to the other party is unconscionable and will not be enforced by a court.

Reasoning of the Court

The court began by stating that ordinarily when a party signs a contract without full knowledge of its terms, that party will have assumed the risk of entering into a one-sided agreement. This rule usually applies because parties to a contract are allowed considerable freedom in making their agreements. This rule applies in most contract situations where the parties stand in an equal bargaining position.

However, unconscionability is the exception to this rule. Especially concerning contracts involving ordinary consumers, a merchant will ask a consumer to sign a form contract printed by the merchant. The consumer has no freedom to bargain for various terms in the contract but must sign what is offered in the merchant's printed contract. Since the consumer has no bargaining power, if the merchant's contract is unreasonable according to ordinary business practices and the consumer had no knowledge of the terms of the contract, the court will find that the contract was unconscionable. This concept means the contract was so unfair that the court should not hold the consumer bound to it.

NOTES:

C. GATHERING INFORMATION ABOUT THE CONSUMER FOR CREDIT OR INSURANCE PURPOSES: *Millstone v. O'Hanlon Reports, Inc.* (1974)

Facts

Mr. Millstone was assistant managing editor of the St. Louis Post-Dispatch, a nationally prominent newspaper. He had worked for the newspaper since 1958 and had been a Washington, D.C., correspondent for seven years before receiving the assistant editor position.

Upon return to St. Louis in 1971, Mr. Millstone's independent insurance agent obtained automobile insurance for him through Firemen's Fund Insurance Company. After the insurance policy became effective, Mr. Millstone received a letter informing him that a routine personal investigation would be made in connection with the new insurance policy to verify his good character for insurance purposes.

On December 20, 1971, Mr. Millstone was informed by his insurance agent that his insurance policy with the Firemen's Fund Insurance Company would be cancelled. The next day, the insurance agent protested the cancellation decision and the Firemen's Fund Insurance Company reversed the cancellation. Nevertheless, Mr. Millstone decided he did not want insurance through the Firemen's Fund Insurance Company, but he did want to know why he was cancelled. An agent with the Firemen's Fund Insurance Company told him he was cancelled because of a damaging report from O'Hanlon Reports, Inc., a corporation that investigated consumers for insurance purposes. O'Hanlon Reports would be paid a fee by insurance companies to gather information concerning the character and reputation of insurance company customers to protect against false and dishonest insurance claims.

On December 22, 1971, Mr. Millstone went to the office of O'Hanlon Reports, Inc. and spoke to the office manager. The office manager told Mr. Millstone that he was entitled to know what was in the report but that he would have to give advance notice before getting the information. When Mr. Millstone complained, the office manager called O'Hanlon Reports' New York office. Mr. Millstone was told that the report was in New York when in fact it was in St. Louis.

Mr. Millstone went back to O'Hanlon Reports on December 28, 1971. The office manager read the one page report to Mr. Millstone but would not allow Mr. Millstone to examine it.

The report covered the time when Mr. Millstone lived in Washington, D.C. The report stated that Mr. Millstone was "very much disliked" by his neighbors, was considered a "hippie-type," and "housed anti-Vietnam-War demonstrators." It also said that Mr. Millstone was "strongly suspected of being a drug user by neighbors but they could not positively substantiate these suspicions."

Mr. Millstone questioned virtually everything in the report but the office manager said that he could not answer any questions; he would only note any complaints from Mr. Millstone. Upon O'Hanlon Reports' reinvestigation of Mr. Millstone's background, most of the information gathered was found to be false and misleading.

The procedures used to gather this information about Mr. Millstone were as follows. An employee of O'Hanlon Reports in the Washington, D.C., area contacted four of Mr. Millstone's former neighbors in Washington, D.C. Three of the four neighbors gave no information to the O'Hanlon employee. All of the information in the original report was obtained from one neighbor in a half-hour discussion. O'Hanlon Reports never made any attempt to verify damaging information in the original or reinvestigation report.

During this period, Mr. Millstone suffered significant amounts of anxiety over the allegations in the reports and sued O'Hanlon Reports for using unreasonable investigative procedures.

Issues for Discussion

1. Did O'Hanlon Reports use reasonable procedures to assure the accuracy of information in its report about Mr. Millstone? If not, how could the procedures be improved to guarantee accuracy?
2. Should insurance companies have the right to investigate a consumer's character, reputation, personal characteristics, or mode of living when the consumer is seeking insurance? Why? If so, what specific type of information should be used for such purposes?
3. Should creditors have the right to investigate a consumer's credit worthiness or credit capacity when the consumer is seeking credit? If so, what specific type of information should be used for such purposes?
4. Should a consumer have a right to see his or her consumer report concerning character or credit worthiness? Why? Should a company like O'Hanlon Reports be required to inform the consumer of the nature, substance, and source of the information in his or her consumer report? If the consumer report contains false or damaging information, what rights should a consumer have to change or explain information in the report?

NOTES:

Decision of the United States District Court

When a consumer reporting agency willfully violates its legal duty to use reasonable procedures in assuring maximum accuracy in its reports and continually fails to disclose the nature and substance of information in its files, the agency is liable for both actual and punitive damages to the consumer.

NOTES:

Reasoning of the Court

The court found that O'Hanlon Reports willfully violated the Fair Credit Reporting Act in making the consumer report on Mr. Millstone. The Act provides that a consumer reporting agency must use reasonable procedures to assure maximum possible accuracy in reporting information concerning a consumer. Furthermore, the Act requires that a consumer reporting agency must disclose the nature and substance of all information pertaining to a consumer when that consumer makes such a request.

Because O'Hanlon Reports never verified the information it gathered on Mr. Millstone and knowingly used false information about Mr. Millstone in its report, the court found O'Hanlon Reports to be in willful violation of the Act. O'Hanlon Reports also violated the Act by continually failing to inform Mr. Millstone of the nature and substance of information in the report. Mr. Millstone was awarded actual damages to compensate him for mental anguish, and he was awarded punitive damages as a punishment against O'Hanlon Reports to prevent future willful violations of the Act.

D. ABUSIVE COLLECTION PRACTICES: *Duty v. General Finance Company* (1954)

Facts

Mr. and Mrs. Duty obtained a loan from the General Finance Company and agreed to pay back the loan by monthly payments. After Mr. and Mrs. Duty failed to make several monthly payments, General Finance and a collection agency employed by General Finance used the following practices for several months to collect the Duty's debt.

Daily telephone calls were made to Mr. and Mrs. Duty about payment. The creditor and the collection agency threatened to "blacklist" Mr. and Mrs. Duty with a local creditor association so that they could not obtain credit. The creditor and the collection agency repeatedly used harsh language in calling the Dutys and referred to them as "deadbeats" in the calls and to their neighbors. The creditor and the collection agency made numerous calls to Mr. and Mrs. Duty's employers requesting that the employers require them to pay their debt. On one occasion, the creditor called Mr. Duty's mother asking about payment of the debt. On another occasion, Mr. Duty's brother was called and asked about payment. Special delivery letters and telegrams were sent to Mr. and Mrs. Duty on several occasions, sometimes at midnight, demanding payment.

Both Mr. and Mrs. Duty alleged that they suffered serious emotional distress, severe headaches and nervous indigestion, as a result of the creditor's and collection agency's actions. Mrs. Duty was dismissed by her employer because of the repeated phone calls while she was working and inability to do her work.

Mr. and Mrs. Duty sued General Finance and the collection agency claiming that the defendants' actions caused them mental anguish and physical injuries. The trial court dismissed the suit stating that the Dutys had no legal basis to sue the defendants.

Issues for Discussion

1. Should Mr. and Mrs. Duty have the legal right to sue the creditor and the collection agency for damages? Why? If so, how should a court determine their damages for the alleged physical injuries? The alleged "mental anguish" injuries?

2. Should a creditor or collection agency be allowed to make repeated calls to nonpaying debtors about their debt? Should a creditor or collection agency be allowed to call a nonpaying debtor's employer or relatives about the debt? What about a young debtor's parents? In what specific situations would you label a creditor's or collection agency's practices "abusive" or "harassing?"

3. Suppose you do not have the money to pay one monthly bill. What should you do? Ignore the overdue notice and wait until you get the money to pay the bill? Call the creditor to explain your situation and make other arrangements? Ask an attorney to file for bankruptcy?

NOTES:

NOTES:

Decision of the Texas Supreme Court

In attempting to collect a debt, when a creditor or those acting on the creditor's behalf engage in a course of conduct with an intent to cause the debtor great mental anguish that results in physical injury and the loss of employment, the creditor and the agents are liable for damages to the debtor.

Reasoning of the Court

The court here did not want to allow suits based simply on mental anguish. The reason for such a rule is that nonphysical injuries resulting from mental anguish are very difficult to prove. Unlike physical injuries (*e.g.*, fractured wrist, loss of an eye) where the loss to the plaintiff can be objectively determined, nonphysical injuries (*e.g.*, emotional distress, psychological suffering) usually can only be determined by subjective impressions.

Therefore, the court found that in this case where the mental anguish caused by the defendants resulted in the plaintiffs' physical injuries and loss of employment, the defendants would be held responsible for the resulting damage to the plaintiffs. Thus, the creditor and collection agency were held liable for using abusive collection methods in this case that resulted in the debtors' physical suffering.

E. RETAKING THE GOODS UPON DEFAULT:

Fuentes v. Shevin (1972)

NOTES:

Facts

Ms. Fuentes purchased a stove and later purchased a phonograph from a Firestone Tire Company store, which was in the business of selling automotive items and home appliances. Both purchases were made on conditional sales contracts in which Ms. Fuentes would make monthly payments. The stove and phonograph cost $500.00 together with a finance charge of over $100.00 for both contracts. Under the contracts, Firestone remained the legal owner of the goods until the contracts were paid in full, and Ms. Fuentes could keep the goods unless she failed to make the monthly payments.

Ms. Fuentes made her payments for over a year. Then she stopped paying when a disagreement developed with Firestone over servicing the stove, even though only 200.00 remained to be paid on the contrats. As a result, a Firestone representative went to small claims court requesting that the court clerk issue an order to take back the stove and phonograph because Ms. Fuentes stopped making payments. Before Ms. Fuentes received any notice of Firestone's actions, the court clerk gave the Firestone representative a paper ordering the sheriff to seize the stove and phonograph. On the same day, a deputy sheriff and Firestone employee went to Ms. Fuentes' home and removed the stove and phonograph. At this time, neither Ms. Fuentes nor any judge had seen the paper that authorized Firestone and the sheriff to take the stove and phonograph.

Issues for Discussion

1. Why would Firestone want to take back the goods without informing Ms. Fuentes? What special circumstances, if any, might justify a seller in immediately taking back goods a buyer has not yet paid for under a conditional sales contract? Should an automobile seller have the right to take back a car that the buyer has not yet paid for under a conditional sales contract without notifying the buyer or without court approval? Why?

2. Is it fair to allow a seller to take back goods that the buyer has not yet paid for under a conditional sales contract before the buyer has any notice from a court concerning the matter? Why? Is it fair if there has been no court hearing on the seller's right to take back the goods? Suppose in this same situation the buyer signs a contract that states, "The seller reserves the right to take back the goods under this contract if the buyer fails to make the agreed payments." Would this fact affect your opinion? Why?

Decision of the United States Supreme Court

NOTES:

A state law that allows a creditor to seize a debtor's property violates the due process requirement where the debtor is given no notice or opportunity to be heard in court before such seizure.

Reasoning of the Court

Due process of law requires that every person be given notice and an opportunity to be heard in court before that person can be deprived of his or her property. The reason for this requirement is to assure that the seizure of property is accomplished only where a party has a legal right to take another person's property.

Even though Ms. Fuentes had not yet paid for the property and thus was not the legal owner, the Court reasoned that a debtor has a property interest in the goods purchased because the debtor has possession and has made partial payment. Therefore, Ms. Fuentes was entitled to receive official notification that her property may be seized, and she was entitled to have a hearing in court to determine whether Firestone had a legal right to seize the goods *before* the seizure could actually be accomplished.

The Court noted that there may be "extraordinary situations" where the seizure could be accomplished before official notification and the court hearing. Although the Court did not specify what these "extraordinary situations" were, it was implied that situations involving automobile purchases would qualify because of the debtor's ability to transport the vehicle before paying for it.

The Court also denied Firestone's claim that it had a right to take back the goods because Ms. Fuentes waived her right to a prior hearing by signing the contracts which stated that the seller had the right to take back the goods. The Court said that a person must be made aware of any waiver of a constitutional right and such a waiver must be clear.

Summary of the Law for Lawyers and Teachers

A. INTRODUCTION

In earlier days, with less industry and less commerce, transactions in the marketplace between sellers and buyers were relatively simple. The law focused on business and trade between commercial buyers and sellers rather than the simple transactions involving ordinary buyers of consumer goods. With the simplicity of the marketplace and the fact that there were fewer consumer goods, the buyer and seller could negotiate purchases and sales from equal bargaining positions. From this equality of positions, the law recognized the doctrine of *caveat emptor*—"let the buyer beware."

But with the growth of manufacturing industries and a marketplace oriented toward consumers, the complexity of transactions between buyers and sellers increased, and the seller, as ultimate master of the production process, assumed a superior position in the marketplace. As most of America became a "consumer society" in the 1950's and 1960's, the doctrine of *caveat emptor* would no longer suffice because of the disparity in bargaining positions between buyer and seller.

With the advent of a "consumer society," the law became cognizant of these changes, and the focus shifted to protecting the consumer against the abuses of unscrupulous merchants. This section will examine the case and statutory developments in the law as it pertains to consumers, looking at the buying or leasing of goods and services, the payment process, and the collection process.

B. BUYING OR LEASING GOODS AND SERVICES:

1. Defective Products

Many provisions of the Uniform Commercial Code (UCC) govern consumer transactions. The UCC is a codification of the laws regulating the field of commerce and is applicable to most commercial dealings in the United States. Concerning defective consumer products, three code sections are particularly important. Section 2-313 defines express warranties as affirmations, promises, samples, or descriptions of goods made by the seller or made part of the basis of the transaction warranting that the goods will conform to such affirmations, promises, samples, or descriptions. Express warranties differ from implied warranties in that the former are created by the seller whereas the latter are imposed by law. Section 2-314 outlines the implied warranty of merchantability stating that a seller who is a merchant impliedly warrants that goods sold "are fit for the ordinary purposes for which such goods are used." Section 2-315 describes the implied warranty of fitness which provides that if the seller has reason to know any particular purpose for which the goods are required by the buyer and the buyer relies on the seller's judgment to provide such goods, then the seller impliedly warrants that the goods will be fit for such purposes. In these last two situations, the implied warranties by law make a commercial seller liable to a consumer for defects in the product.

A question arises as to what is a defective product. Is a car which is fit for the ordinary purpose of driving defective if it is unsafe in collisions? In *Larson v. General Motors Corp.*, 391 F.2d 495 (1968), the plantiff claimed that in a head-on collision the steering mechanism of a Corvair would be pushed into the driver's head. The court held that an auto manufacturer had a duty to design cars in a manner that would protect the occupants in case of collision since it was foreseeable that many cars would be involved in collisions.

Two theories have been employed to make the seller liable to a consumer for damages resulting from defects in the product—one theory based on contract law and arising from the implied warranties outlined above, the other theory based on tort law and embodied in the concept of strict enterprise liablility. The latter theory is stated in the Restatement (Second) of Torts §402A which states,

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

As the two theories have developed, the courts have chiseled away many of the major distinctions between them. Under each theory, fault on the part of the seller is not a factor since the seller will be held liable for a defect in the product at the time of the sale. Disclaimers of warranties and lack of privity of contract (no duty is owed to one not a party to the contract) can be obstacles in cases involving the implied warranties, but some courts have employed the doctrine of unconscionability to set aside disclaimers and privity allegations. *See, Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960) (included in Cases for Students); *Santor v. A. and M. Karagheusian, Inc.*, 44 N.J. 52 (1965), *infra.* Since disclaimers and privity are concepts of contract law, they have no application to the strict enterprise liability theory.

However, a major issue under both theories is what losses are recoverable by the consumer. These issues were addressed in two leading cases. In *Santor v. A. and M. Karagheusian, Inc., supra,* a consumer purchased certain retail carpeting manufactured by the defendant. After the carpet was laid in the consumer's home, unusual lines developed in the carpet. After finding out that the retailer had gone out of business, the consumer sued the manufacturer for damages for breach of the implied warranties. The New Jersey Supreme Court held that the manufacturer was liable under both theories for breach of the implied warranties and strict liability in tort. The court reasoned that when a manufacturer presents goods for sale to the public he must also represent that such goods are safe and suitable for their intended use. The court ruled that under either theory, a consumer could recover losses for personal injuries *or* property damage. In *Seely v. White Motor Co.*, 63 Cal. 2d 9 (1965), a consumer purchased a truck manufactured by the defendant. When the consumer drove the truck for his hauling business, the truck would bounce violently. Even though the consumer took the truck to the defendant to be repaired, the bouncing continued for 11 months until one day the truck overturned when the defendant attempted to turn a corner. The consumer was not injured in the accident but sued the defendant for the cost of repairs, money already paid on the purchase price, and lost business profits. The California Supreme Court allowed the award of damages for money already paid on the purchase price and lost business profits based on a breach of warranty that the truck was free from defects. The court refused to allow an award of damages for the cost of repairs claiming that such damages were an economic loss not covered under the strict liability theory.

Courts have also analogized the buying of defective products to the leasing of defective products. Therefore, liability has been imposed upon the lessor of the defective products based on a breach of warranty theory or strict liability theory. *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434 (1965). Liability has also been imposed upon the seller of services for the defective rendering of such services. *Newmark v. Gimble, Inc.*, 54 N.J. 585 (1969).

Defective products have been the subject of federal legislation as represented by the Consumer Product Safety Act of 1972, 15 U.S.C., §2051 *et. seq.* The Act established a Consumer Product Safety Commission with the authority to ban hazardous products and promulgate consumer product safety standards, the violation of which is subject to civil or criminal penalties.

2. Limitation on Warranties

Although merchants may be liable for damages caused by their defective products, under the UCC they may limit or disclaim their warranty liability. Section 2-316 allows a merchant to limit or disclaim the implied warranty of merchantability if language is used which specifically mentions merchantability and, in case of a writing, the language is conspicuous, *i.e.*, noticeable print in larger type or a different color. The implied warranty of fitness can be limited or disclaimed only by conspicuous, written language.

Regarding consumer transactions, the courts have disfavored disclaimers of the implied warranties. *Henningsen, supra,* is a good example of this trend. Here, the auto manufacturer expressly warranted that the plaintiff's car was free from defects and if any part was found defective, such part would be repaired or replaced within 90 days after delivery of the car or before it was driven 4,000 miles. This warranty was made expressly in lieu of all other warranties. The plaintiff gave the car to his wife as a gift, and 10 days later when she drove it she was injured in an auto accident. Both sued the auto manufacturer for negligence and breach of warranty claiming that the car's defective steering mechanism caused the accident. The New Jersey Supreme Court ruled that the plaintiffs were entitled to recover damages for personal injuries resulting from a breach of the implied warranty of merchantability. The court held that the disclaimer was void as a matter of law because of the unequal bargaining positions between buyer and seller as a result of the seller's use of a standardized, form contract and the inconspicuous disclosure of the warranty.

Concerning the disclosure of warranties, Congress entered the field with the Magnuson-Moss Warranty Act of 1975. Under the Act, manufacturers or sellers using written warranties in connection with the sale of a product costing more than $5 must fully and conspicuously disclose in simple language the terms and conditions of such warranty. If the product costs more than $10, all written warranties must be designated as either "full" or "limited," clearly and conspicuously. Sellers and manufacturers who give a full warranty must fix a defective product within a reasonable time and without charge, and if repair efforts do not correct the defect, the consumer is entitled to choose between a refund or replacement without charge.

3. Unfair and Deceptive Advertising

At common law, the consumer was only protected against false advertising with a remedy in tort known as deceit or in contract for breach of warranty. Today, the Federal Trade Commission (FTC), charged with the responsibility of protecting the public from unfair or deceptive acts or practices in commerce, regulates advertising practices. Many states also have their own unfair commercial practices legislation.

According to FTC guidelines, deceptive advertising is that with a capacity to deceive; it need not be false. One deceptive practice prohibited by FTC guidelines is "bait and switch" advertising. This practice involves an item being advertised at a very low price, but when the consumer comes to the store, the seller attempts to sell the consumer another more expensive item. Such practices are found where the seller refuses to show the advertised item, speaks poorly of the advertised item, fails to have a reasonable quantity of the advertised item, or refuses or fails to deliver the advertised item. In *Tashof v. FTC*, 437 F.2d 707 (1970), this practice was prohibited where a seller advertised eyeglasses at a $7.50 price and sold less than 10 pairs, but sold almost 1,400 pairs of other eyeglasses at a higher price.

Although the major method of enforcing FTC regulations has been cease and desist orders, a modern development has been the imposition of corrective advertising. In a major administrative case, *In re Warner Lambert Co.*, FTC No. 8891 (1974), after finding that the makers of Listerine mouthwash falsely advertised that Listerine prevents and cures colds and sore throats, and FTC Administrative Law Judge ordered the company to make the following disclosure in all Listerine advertisement for two years: "Contrary to prior advertising, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats." The extent to which this controversial enforcement method is utilized will be determined by future actions of the FTC and the courts.

4. Unconscionability

Courts will sometimes refuse to enforce consumer contracts found to be unconscionable. The doctrine of unconscionability was recognized in common law and was restated in the UCC. Although the concept is not expressly defined, UCC §2-302 allows a court to refuse enforcement of unconscionable contract provisions or unconscionable contracts altogether.

Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (1965) (included in Cases for Students), is the classic case on unconscionability. Here, the consumer purchased some 16 items totalling $1,800.00 from one merchant over a period of about five years. A form contract for each purchase allowed the merchant to retain a security interest in all items previously purchased until every item was paid in full; thus, when the consumer defaulted on the last item purchased, the merchant attempted to repossess all of the items purchased. In the famous opinion by Judge J. Skelly Wright, the contract could not be enforced because it was unconscionable at the time it was made. According to Judge Wright, the concept of unconscionability had a broad interpretation focusing on the absence of meaningful choice by one of the parties to the contract and terms unreasonably favorable to the other party. This situation often arises in consumer transactions where the buyer must sign the seller's standardized, form contract upon purchase. Judge Wright's formulation of the unconscionability test was whether "the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place."

Courts have also found contracts to be unconscionable where there is a gross disparity between the value of a consumer product and its price. In *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (1969), the consumer purchased a freezer on credit with a purchase price of $900.00 to be financed at a credit price of $1,234.00. The freezer actually was valued at no more than $300.00. Based on the disparity between price and value, the limited resources of the consumer, and the consumer's lack of bargaining power, the New York Supreme Court held that the contract was unconscionable.

5. Home Solicitation

Consumers have been afforded protection in the area of home soliciation sales, more commonly known as door-to-door sales. The theory behind this protection was that consumers are much more susceptible to deceptive practices in home solicitation sales because the buyer is usually a captive audience of the seller. Sellers utilizing these practices aim high-pressured sales at the poor or the elderly. In these sales, the buyer lacks the power of comparative shopping.

Many states have adopted legislation based on the Uniform Consumer Credit Code provisions to give the consumer a measure of protection in these sales. The Uniform Consumer Credit Code (UCCC) is a codification of laws pertaining to consumer credit outlining guidelines states can use in drafting legislation. State legislation modeled on the UCCC provisions regarding home solicitation sales usually applies to credit sales only and requires that both the solicitation and the signing of the contract occur at the consumer's home. The consumer is then entitled to a 72-hour "cooling off" period in which the sale may be cancelled and the consumer need not give any reason for the cancellation.

FTC regulations go further than many state laws in regulating home solicitation sales and, because the supremacy of federal law supersedes state laws, FTC regulations apply to all home solicitation sales whether cash sales or credit sales. It is a deceptive trade practice to fail to give a consumer three days in which to cancel any home solicitation sale. The FTC regulations also require that the door-to-door seller give the consumer oral and written notice of the right to cancel within a three-day period.

6. Referral Sales

Another sales practice susceptible to abuse is the referral sales scheme in which the consumer enters into one agreement for the purchase of goods or services and another agreement in which the seller agrees to compensate the consumer for each new customer referred to the seller. In unscrupulous referral sales, the price of the goods or services are often very high with the promised inducement of large discounts for each referral. But with the discount being promised in another agreement, the seller receives the inflated purchase price and the buyer has the difficult task of enforcing the other agreement for compensation from referrals.

For example, in one agreement, the seller offers a stereo (generally retailing for $100.00) to the consumer at the inflated price of $300.00. But, in another agreement, the seller also offers the promised inducement of giving the consumer a $100.00 discount on the stereo purchase price for every person the buyer can refer to the seller and who also purchases a $300.00 stereo. The seller receives his $300.00 under the first agreement, but the buyer must get his $100.00 discount under the separate, second agreement.

Many states have adopted legislation based on the UCCC provision prohibiting referral sales schemes in which compensation to the consumer is conditioned on the occurrence of an event after the time of the sale, *i.e.*, if the compensation is dependent on a referred customer actually buying the product or service.

C. PAYING FOR GOODS AND SERVICES

There are basically two ways in which consumers can pay for goods or services. They can arrange to pay the full purchase price by cash payment or defer payment of the full price plus any interest or finance charges by a credit arrangement.

1. Cash

In commercial transactions, cash payment usually means payment by check. In paying for goods and services by check, the consumer has the important right to stop payment of the check immediately after the purchase by calling the bank and requesting a stop order on the check. The stop order may be a useful device when the consumer has purchased a defective product or one fraudulently misrepresented.

The stop order does not release the consumer paying by check from any liability, but it does force the seller holding the check to come to the consumer for payment. At this time, the consumer can inform the seller of any complaints and request adjustments rather than enforce any rights by way of suit after payment.

2. Credit

A consumer may pay for goods and services by credit usually involving one of the three following methods. In an *installment purchase*, the consumer pays the purchase price plus a finance charge in equal installments over a specific period of time. The consumer may utilize a *revolving charge account* in which purchases are paid for on a monthly basis without a finance charge if paid in full or with a finance charge if paid in installments. Finally, the consumer may use a three-party *credit card* like Master Card or American Express which are accepted by merchants who receive payment for purchases through the credit card company which then bills the cardholder-purchaser.

3. Disclosure

One of the major problems facing consumers in the 1950's and 1960's was the different kinds of information given them about credit transactions. Especially regarding the rate of interest to be charged in consumer credit transactions, the absence of uniformity allowed crditors to state the rate of interest in a variety of ways. For example, three merchants advertise the same stereo on sale for $500.00 with "easy credit terms." One merchant states "financing at 1½% per month" another "dollar add-on financing only $7.00 per $100 per year," the other "$7.00 per year discount on a $100 financing" available. Consumers, while knowing they were getting the same stereo for $500.00, had no way of comparing these various statements of the rate of interest being charged to finance the purchase.

Congress moved to resolve this problem with the Consumer Credit Protection Act of 1968. 15 U.S.C. 1601, *et seq.* A major component of this legislation was the Truth in Lending Act which requires that a creditor extending consumer credit disclose essential credit terms. A general disclosure requirement of the Truth in Lending Act is that all disclosures be made "clearly, conspicuously, and in meaningful sequence." Concerning closed end credit (transactions like consumer loans, installment purchases, etc. where credit is extended for a specific period), the two most important disclosure requirements are disclosure of all costs included in the finance charge and disclosure of a uniform determination of the rate of interest known as the annual percentage rate. With the annual percentage rate, consumers can compare interest rates offered in credit transactions.

The Act requires somewhat different disclosures for open end credit (transaction like revolving charge account purchases, three-party credit card purchases, etc. where the consumer has the option to pay in installments or pay the full balance). An initial disclosure is required before the first transaction is made on the account stating when the finance charge will be imposed, the balance on which the finance charge will be imposed, and a "nominal" annual percentage rate. Since in open-end credit arrangements the actual finance charge and annual percentage rate cannot be determined at the outset because the account is opened before any purchases, disclosure requirements for the initial statement basically are to inform the consumer how these amounts will be determined. Another disclosure requirement is the periodic statement. Periodic statements from the creditor on an open-end credit account must be sent to the consumer at the end of each billing cycle (usually a monthly basis) disclosing the previous balance, amounts and dates of each purchase, the actual finance charge, the actual annual percentage rate and the new balance.

4. Rate Regulation

The cost of credit has traditionally been regulated by usury laws. In earlier times, usury laws usually prohibited a lender from making a loan charging interest above 6% per year. However, as consumer credit expanded, it was recognized that lenders could not profitably lend money to consumers at 6% interest because consumer loans would be small, over short periods of time, and risky ventures in general.

Two methods were used to remove consumer credit transactions from the purview of state usury laws. One method was the adoption of state laws based on the Uniform Small Loan Law which allowed lenders of less than $300.00 to charge no more interest than 3½% per month. The other method was the judicially created "time-price" doctrine. This doctrine stipulated that a retail credit sale was not a loan but a sale with two prices: one price if payment was made on the date of purchase and another price if payment was to be made at a later time. Since the sale was not a loan, it was not subject to the state usury laws.

Once consumer credit was taken from the purview of antiquated usury laws, some rate regulation was required in the consumer credit industry to allow for reasonable but not extortionate profits by creditors. Some states regulated consumer credit interest rates by updating old usury laws so such laws would be applicable to modern consumer credit transactions. Courts in other states applied usury laws to consumer credit transactions, even open-end credit transactions such as revolving charge accounts. *State v. J.C. Penney, Co.*, 48 Wis. 2d 125 (1970). Other states adopted legislation modeled on the UCCC, which imposed high ceilings on interest rates for various consumer credit transactions instead of actually setting rates. For revolving charge accounts, the UCCC provides for a limit of 24% for balances of $500.00 or less, and 18% for balances of more than $500.00. For revolving loan accounts and other closed end credit transactions, the limits are as follows: 36% for balances to $300.00; 21% for balances from $300.00 to $1,000.00 and 15% for balances over $1,000.00 or 18% overall. Considering the current impact of inflation on interest rates, rate regulation may well be subject to reconsideration once again.

5. Fair Credit Reporting and Equal Credit Opportunity

Two other components of the Consumer Credit Protection Act are worth noting. The Fair Credit Reporting Act of 1970 regulates the practices of the credit reporting industry.

Before extending credit to a consumer, most creditors will order a credit report from a credit agency which compiles financial and other related information on individuals who have previously been granted credit. Practices in the credit reporting industry sometimes led to the reporting of inaccurate or misleading information or an encroachment on the consumer's privacy. For example, an unfair practice would involve informing creditors that the consumer was a "deadbeat" based on unverified information received from a "nosy" neighbor.

Under the Act, consumer credit reports can only be used for five purposes: (1) credit; (2) insurance; (3) employment; (4) obtaining a government license or benefit; or (5) other legitimate business needs involving the consumer. The Act requires that credit reporting agencies maintain reasonable procedures to prevent obsolete and inaccurate information in consumer credit reports. When a consumer credit report is used to reject a consumer for credit, insurance, or employment, the user of such report must notify the consumer of the name and address of the credit reporting agency which made the report. A consumer has a right to information in a consumer credit report concerning the nature and substance of such information, the source of the information, and the name of any recipients of the report. A credit reporting agency has a duty to investigate a consumer's claim that the report is inaccurate or incomplete, and a consumer may file a written statement with the report stating the nature of the claim when any dispute is unresolved.

The Equal Credit Opportunity Act of 1975 was enacted by Congress to alleviate discrimination against women in the granting of credit. The Act specifically prohibits evaluating credit applications on the basis of sex or marital status or changing the terms of credit solely because of a change of name or marital status. A former practice in granting credit would allow a husband to obtain credit on his own but not a wife unless her husband was a party to the transaction. In 1976, the Act was amended also prohibiting discrimination in a credit transaction on the basis of race, color, religion, national origin, or age.

6. Security Interests

Creditors often seek some degree of security to insure that consumers repay debts. For instance, before lending money to a consumer, a bank might require that the consumer give the bank certain rights to property of the customer. The property becomes *collateral* for the loan and the bank has a *security interest* in the property. If payment is not made, the bank may take the collateral to get proceeds for payment of the debt. Sometimes creditors will secure payment by taking a security interest in the goods the consumer is buying *e.g.*, an auto, stereo, or T.V., which gives the creditor the right to take back the goods if payment is not made.

States have enacted legislation regulating creditor practices in taking security interests. Some states disallow a creditor's security interest in the debtor's real property to secure consumer loans and purchases. Other states only allow purchase money security interests in consumer transactions, *e.g.*, security interests in goods sold by the creditor or purchased with loan money from the lender.

7. Credit Cards

Consumer use of credit cards has become a way of modern life. A cardholder has credit extended without the necessity of establishing a good credit rating for each purchase. The cardholder's creditworthiness is determined by the card issuing company before the card is issued. Merchants honoring the card receive payment from the card issuing company which then bills the cardholder.

Two issues of concern to the consumer using a credit card are within the purview of the Truth in Lending Act. One issue, especially in regard to three-party credit cards, is whether the consumer can assert any defenses against the card issuing company when a defective product is purchased from a merchant honoring the card. The Act states that a consumer can assert such defenses against the card issuer when the merchant is closely associated with the card issuer, when the sale involves more than $50.00 and the consumer's address is in the same state as the merchant's business, or is within 100 miles of the merchant's business, or when the card issuer includes the merchant's advertisements in billing statements and urges use of the card for the merchant's products.

The other issue concerns the cardholder's liability for unauthorized use of his or her credit card. The Act limits the cardholder's liability to $50.00 for unauthorized use. Furthermore, the card issuer can only collect up to $50.00 for unauthorized use when all the following conditions are met: (1) the card was accepted by the cardholder; (2) notice of potential liability was given to the cardholder; (3) the card issuer provided addressed notification which the cardholder may return in the event of loss or theft of the credit card; (4) unauthorized use occurred before the cardholder notified the card issuer of loss or theft of the credit card; and (5) the card issuer provided a method of identifying the unauthorized use such as signature verification.

D. COLLECTING CONSUMER DEBTS

For various reasons, a consumer may be unable or unwilling to pay off debts. When consumers do not make the required payments for an obligation, they are in default. Upon default, the creditor has a number of remedies in seeking payment. These remedies and their limitations will be discussed below.

1. Informal Debt Collection

Before employing any judicial efforts to collect consumer debts, creditors frequently use informal means in seeking payment such as oral or written communications with the debtor or the use of collection agencies. Although these methods are relatively simple and inexpensive, they often have led to abusive collection practices.

In 1978, Congress added the Fair Debt Collection Practices Act to the Consumer Credit Protection Act. The new law established comprehensive restrictions on the practices of those engaged in the business of debt collection. The Act prohibits debt collectors from communicating with a debtor at unusual times and places. It also mandates use of validating procedures for the consumer debt in order to verify its accuracy. The Act prohibits debt collectors from the use or threat of violence, the use of obscene language, the publication of a list of defaulting debtors, and repeated telephoning with an intent to harass. The debt collector is also prohibited from contacting third persons unless for the purpose of finding the location of the debtor or contacting the debtor's employer in connection with a judicial action.

2. Attachment

Upon default on an obligation, a creditor can sue the debtor to obtain personal judgment for the amount of the debt. Because of the time and expense of this collection method, many creditors will utilize remedies available prior to a court judgment. One such remedy is attachment in which a writ of execution is issued by a court to seize the personal property of a debtor to hold such property pending the outcome of a suit for a personal judgment or to satisfy a personal judgment already obtained. Therefore, the remedy of attachment is available to the creditor prior to or after judment.

The creditor may attach any nonexempt personal property of the debtor. Almost all state laws exempt certain personal property from the creditor's reach, such as clothing, furniture, personal items, etc.

3. Garnishment

Another important method of attachment is garnishment. The remedy is sometimes available before judgment and usually allows the creditor to receive a part of the debtor's wages. After the creditor files suit for a personal judgment, the creditor may obtain a court order requiring that the debtor's employer pay part of the debtor's wages to the creditor until the suit has been tried. If the creditor wins, the wages collected are used to satisfy the judgment, but if the creditor loses, the wages are returned to the debtor.

Prejudgment garnishment allows a creditor to attach the debtor's assets before a judicial determination of the debtor's liability. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the Supreme Court ruled that a Wisconsin prejudgment wage garnishment law was unconstitutional because it violated due process in depriving the debtor of his property without giving him notice and hearing on whether the creditor was entitled to recover against the debtor.

Since *Sniadach*, many states have abolished prejudgment wage garnishment laws altogether or amended the laws to afford the debtor notice and hearing on the merits of the wage garnishment before attachment. Also, under the Consumer Credit Protection Act, a creditor can take no more than 25% of a debtor's disposable weekly earnings or an amount by which disposable earnings exceed thirty times the federal minimum hourly wage. The Act also prohibits the discharge of any employee because his or her earnings have been garnished for "any *one* indebtedness."

4. Replevin and Repossession

Like attachment, another prejudgment remedy is replevin. If a creditor has an interest in specific property, *i.e.*, property purchased from the creditor (not any nonexempt personal property of the debtor as in the case of attachment), upon filing suit for a personal judgment and obtaining a court order, the creditor may seize this specific property until resolution of the suit. The same problem that existed in *Sniadach* with reference to prejudgment wage garnishment also existed in cases involving prejudgment replevin actions—the creditor took the debtor's assets before a judicial determination of the debtor's liability. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (included in Cases for Students), the Supreme Court held that such prejudgment replevin statutes violated due process in allowing seizure of the debtor's property without notice or hearing on the validity of the creditor's claim even where the sales contract gave the creditor the right to repossess upon default. Following *Sniadach* and *Fuentes*, most states have now strictly limited a creditor's right to prejudgment remedies or abolished them altogether in consumer transactions.

A similar remedy even more controversial than replevin is repossession. Repossession differs from replevin in that the former is accomplished without a court order but through the "self-help" measures of the creditor or his or her agents. The remedy of repossesion is embodied in UCCC §9-503 which provides, "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace . . ." A breach of the peace is usually interpreted to mean an act likely to produce violence, *e.g.*, where the creditor or his or her agents attempt to seize the collateral while the debtor is present and protesting.

The most common case of self-help repossession is where the secured creditor seizes the car of the defaulting debtor. Some states have placed limitations on the remedy of self-help repossession such as limiting the remedy to the seizure of cars upon default. Most courts have held that the constitutional limitations of due process concerning notice and hearing as applied in *Shiadach*, *supra*, and *Fuentes*, *supra*, do not apply in the case of self-help repossession since without court involvement there is not state action.

After repossession, the debtor can only reclaim the seized property by paying the total amount due plus the cost of repossession. If the debtor does not reclaim the property, the creditor may resell the property for a commercially reasonable price and apply the proceeds from the resale to the unpaid debt and the cost of the resale. Although the creditor may seek a deficiency judgment where the proceeds from resale are insufficient to pay off the debt, many states have adopted provisions modeled on the UCCC limiting the right to a deficiency judgment UCCC §5.103 prohibits deficiency judgments in cases where the price of the repossessed goods was $1,000.00 or less.

E. CONCLUSION: CONSUMER RIGHTS TO REDRESS GRIEVANCES

One significant problem in consumer protection is the complicated maze of applicable laws and regulations that give consumers no direction in redressing their complaints.

However, this concluding passage suggests some avenues consumers should follow.

The consumer first should address any problems to the seller or creditor. The vast majority of merchants wish to satisfy their customers in order to continue business with them. If a dispute develops and goes unresolved, the consumer may wish to seek outside assistance. Private consumer or business organizations such as the Consumer Credit Counseling Service or the Better Business Bureau may be able to provide needed assistance. The local media may also be a source of assistance through special programs dealing with consumer problems. Next, the consumer may enlist the services of local, state, or federal government agencies. Most local and state governments now have consumer affairs agencies to assist consumers in resolving complaints. Also, consumers may solicit assistance from state and local governmental agencies that regulate or license many businesses and professions such as doctors, lawyers, insurers, realtors, etc. On the federal level, many governmental agencies have jurisdiction over specific areas of consumer affairs and some have already been mentioned such as the FTC and the Consumer Product Safety Commission.

Before resorting to individual legal action concerning minor problems (product defect, inaccurate billing, etc.), the consumer probably should seek assistance through one of the above sources. Regarding individual legal actions, most states have established small claim courts to handle cases involving small sums of money, *i.e.*, usually up to $1,000.00 or $2,000.00 limits. Usually, a consumer does not need an attorney in small claims court. Informal procedures are used in such courts and staff may be available to assist the consumer in properly filing his or her suit. However, legal action in a regular civil court may be necessary in more serious instances (*e.g.*, injuries caused by defective products, wage garnishment, adverse personal judgments). Here the services of an attorney are necessary. Although the cost of legal services may be expensive, many consumer protection statutes provide that the successful consumer litigant may recover reasonable attorney fees from the defendant.

Finally, if consumers have so many debts as to render them insolvent, they may file for bankruptcy under the federal law. Bankruptcy is a procedure whereby a debtor can discharge his or her debts in order to start over and build a new economic life. Once the debtor's petition for bankruptcy is accepted by the bankruptcy court, the debtor is discharged of his or her debts, and any assets owned by the debtor at that time are taken and divided among creditors. Certain property determined by state law is exempt from being taken by creditors such as clothing, household goods, and the home. The Federal Bankruptcy Act was substantially revised and streamlined in 1978 but has been the subject of considerable controversy as a result of claims that it is too lenient in allowing declarations of bankruptcy. Nonetheless, some experts advise bankruptcy only as a last resort because of adverse consequences affecting credit worthiness and future purchasing power.

Part Two

Secondary School Publications: A Sampling of Materials and Methods for Teaching About the Law

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Introduction

This section includes a sampling of currently published and widely used law-related education (LRE) materials, derived from eight different sources. They supplement and broaden the topics and methods used in Part I. This introduction explains why they were chosen and how they can be used.

1. On Dispute Settlement, The Adversary System, and Lawyers. Despite the wide range of high quality LRE materials now available, many student texts take the basic structure of our judicial system for granted. Few consider alternative ways to settle disputes outside of court or the problems as well as the advantages of the adversary system. Nor do they deal adequately with the questions that students (and teachers) frequently ask about lawyers: When do I need one? And how can I find one? This selection confronts these critical issues. They are the kinds of topics with which lawyers can be especially helpful in discussions with students.

2. *What is a Contract?* Many teenagers have part-time jobs and most of them have bought or sold bikes, stereos, sports equipment, jewelry, or other personal property. Therefore, they are appropriately concerned with when a promise is a legal contract and when they can "get out of a contract" they think is unfair. Since contracts are not directly covered in Part One, this selection is included because it explains the basic elements of a contract in clear and simple language. In addition, it illustrates a wide variety of methods that can be used to teach this topic, including field activities, discussion questions, hypotheticals, stories, and actual cases.

3. *Corrective Justice.* Although law schools focus on substantive subjects such as torts, contracts, or property law, some law-related educators prefer an approach that focuses on legal concepts such as authority, freedom, privacy, or justice. This excerpt on corrective justice illustrates the conceptual approach to teaching about law in secondary schools. It gives students a set of "intellectual tools" to use in dealing with issues of corrective justice and asks students to apply these tools to a hypothetical case involving government corruption.

4. *The Right to Petition.* Although Part One discusses several First Amendment freedoms, it does not focus directly on the right of citizens to petition the government for redress of grievances. This excerpt examines that fundamental right through the use of two important U.S. Supreme Court cases. This First Amendment freedom is presented in its historic context and this lesson illustrates the way an entire course can be built around significant decisions of the High Court.

5. *Mock Trials and Appeals.* These simulated court proceedings are among the most popular teaching devices used in secondary schools. This excerpt uses a landmark Supreme Court case concerning student freedom of speech, and it gives specific instructions on how to run a mock trial or appeal in the classroom. Lawyers can be especially helpful in assisting teachers with this simulation and in helping them find and adapt other court cases for classroom use.

6. *Students and the Bill of Rights.* Often students are taught about the Bill of Rights as if it only applied to adults and as if there were no relationship between rights and responsibilities. This excerpt suggests that constitutional rights apply to students as well as adults and that there is an important and close relationship between a student's rights and responsibilities. It also includes a "fantasy" exercise that is useful in helping students consider which constitutional rights are most important to them and why.

7. *Due Process in Public Schools.* There are many confusions concerning due process in the public schools. Some students mistakenly believe that they have the same due process rights in school disciplinary proceedings as they have in court. Others do not understand what due process means or how it applies in cases of suspension or expulsion. This excerpt tries to clarify these issues through the use of a landmark Supreme Court case on the subject and an examination of the scope and limits of student due process.

8. *The Case Method.* Although almost all law students have been exposed to the case method, few have reflected upon its many possible uses in teaching secondary students. Therefore, we include this excerpt to give readers a broader awareness of the case method: the ingredients of the method, its multiple purposes and features, how and why to ask probing questions, a variety of ways to use the method, and a handout to assist discussion.

We wish to give special thanks to the publishers of the excerpts contained in this section for their permission to reproduce these selections.

1. On Dispute Settlement, the Adversary System, and Lawyers

from *Street Law*, West Publishing Co., 1980

This 365-page student text is designed "to provide practical information and problem solving opportunities" and to develop "the knowledge and skills necessary for survival in our law-saturated society." The text includes activities such as case studies, mock trials, role plays, small group exercises, opinion polls, and visual analysis activities. It consists of six sections: An Introduction to the Law and the Legal System, Criminal and Juvenile Justice, Consumer Law, Family Law, Housing Law, and Individual Rights and Liberties. In addition there is a comprehensive 298-page Teacher's Manual to supplement the text. Both volumes are available from West Publishing Company, 170 Old Country Road, Mineola, N.Y. 11501, (516) 248-1900.

The following excerpts are from the *Street Law* student text, Introduction to Law and the Legal System, and from the Teacher's Manual. (Photographs have been deleted.)

From *Street Law* Student Text

SETTLING DISPUTES OUTSIDE OF COURT

Many problems that arise in everyday life can be settled without going to court. In fact, there are sometimes disadvantages in taking a case to court. Because of backlogged cases and complicated rules and procedures, courts are often quite slow. Furthermore, the total cost of an attorney, pretrial discovery, witness fees, and other court expenses may be more than the case is worth.

Most people solve both simple and complicated problems on their own without going to court. If a person's dog barks all night and disturbs a neighbor, the neighbor will probably complain to the dog owner before considering going to an attorney. It would be difficult for society to function if people had to hire attorneys and go to court every time they had a problem or a dispute.

Despite the important role of courts in our legal system, there are a number of other ways in which people can settle disputes. Among the most common methods for solving disputes outside of court are *negotiation, arbitration,* and *mediation.*

Negotiation simply means that the parties to a dispute talk to each other about their problem and try to reach a solution acceptable to all. Sometimes people cannot settle a dispute on their own and hire attorneys to negotiate for them. For example, people involved in auto accidents sometimes hire attorneys to negotiate with the insurance company over payments for injuries or damages to their car. People who hire attorneys to negotiate for them must approve any agreement before it becomes final. In some situations, attorneys will file a case in court and then attempt to work out a *settlement* so that the case never actually goes to trial. A large number of civil cases are settled this way, saving both time and money.

Another method for resolving disputes, mediation, takes place when a third person acts as a go-between who tries to persuade both parties to settle their problem. For example, a parent who sees two children arguing over which TV show to watch acts as a mediator by persuading the children to agree on a program.

In many places mediators help people solve legal problems or disputes. For example, consumer agencies often help settle disputes between consumers and store owners by acting as a mediator or go-between.

A third method for settling disputes outside of court is called arbitration. This takes place when both parties to a dispute agree to have a third party listen to their arguments and make a decision. Arbitration differs from mediation because a mediator helps the parties to reach their own decision while an arbitrator makes a decision for the parties.

Problem 9

Consider each of the situations below and decide the best method for settling the dispute. In each case decide whether the problem would be best handled by an informal discussion between the parties, negotiation, mediation, arbitration, going to court, or by some other method. Discuss the reasons for your answer.

a. A parent agrees to pay all of his daughter's college expenses but later changes his mind.
b. A stereo you bought broke after two weeks and the salesperson refuses to fix it.
c. A landlord will not make needed repairs because he believes the tenant caused them.
d. A labor union and an employer disagree over the wages and conditions of employment.
e. A married couple wants a divorce.
f. The Internal Revenue Services sends you a letter stating that you owe another $200 in taxes. You disagree.

THE ADVERSARY SYSTEM

The trial system in the United States is an adversary process, which means it is a contest between opposing sides. The theory of this process is that the trier of fact (judge or jury) will best be able to determine the truth if the opposing parties present their best arguments and attempt to discredit or to show the weaknesses in the other side's case.

If a criminal case goes to trial, the prosecution has the burden or responsibility of proving the defendant guilty *beyond a reasonable doubt*. In a civil case the burden is on the plaintiff to prove his or her case by a *preponderance of the evidence* (greater weight of evidence). The standard of proof is more difficult in a criminal case because of a belief that more evidence should be required to take away a person's freedom.

The adversary process is not the only method for handling legal disputes, and, in fact, many countries have systems differing from our own. Moreover, the adversary process is sometimes criticized as not providing the best setting for the discovery of truth with respect to the facts of a specific case. Critics believe that the adversary process is no more than a battle in which lawyers behave as enemies, making every effort *not* to present *all* the evidence they know. In this view the goal of trial is "victory, not truth or justice."

On the other hand, the adversary process has long served as the cornerstone of the American legal system, and most attorneys believe that approaching the same set of facts from totally different perspectives and objectives will uncover more truth than would other methods.

Problem 10

a. Which of the viewpoints concerning the adversary process do you favor? Why?
b. Do you agree or disagree with the following statement: "It is better that ten guilty persons go free than that one innocent person suffer conviction." Explain your answer.
c. In a criminal case, should a lawyer defend a client whom he or she knows to be guilty? Discuss . . .

Problem 11 omitted.

LAWYERS

There are over 450,000 lawyers in the United States and almost 325,000 attorneys in active practice. Law firms and lawyers in private practice account for about sixty-five percent of the lawyers in the United States. Around fifteen percent are government lawyers who work for the various federal, state or local agencies. Another fifteen percent work for various corporations, unions, or trade association. A small number of lawyers work for public interest or legal aid organizations. An even smaller number are law professors, judges, or elected officials.

Contrary to popular belief, most lawyers rarely go to court. The practice of law usually involves giving advice, drafting legal opinions, negotiating settlements, or otherwise providing out-of-court legal assistance.

Some lawyers do, however, go to court. In a civil case the lawyers stand in place of their clients and act as advocates for their clients' positions. Likewise, in a criminal case the lawyer for the defendant has a duty to do anything possible (without violating a code of professional ethics) to secure the release and acquittal of his or her client.

When Do You Need A Lawyer?

One of the most important things a person needs to know is when to get a lawyer. Many people think of seeing an attorney only after they get into trouble, but perhaps the best time to consult an attorney is before the problem arises.

Preventive advice is one of the most important services a lawyer can provide. You should consider consulting an attorney about a number of common situations, including the following:

- Buying or selling a home or other real estate
- Organizing a business or making a major purchase
- Changing your family status (*e.g.*, by divorce or adoption)
- Making a will or planning an estate
- Signing a large or important contract
- Handling accidents involving personal injury or property damage
- Defending a criminal charge or bringing a civil suit

Of course, there are limits to the services a lawyer can provide. If your problem is one that requires a business or economic decision, a good businessperson may be a better adviser than a lawyer. For many other problems a teacher, doctor, or friend may be a better source of advice.

Problem 12

Each of the following examples involve situations in which an attorney may or may not be needed. For each situation discuss the reasons why you may or may not need an attorney.

a. You run into another car in a parking lot. Your insurance agent indicates the company will pay costs for bodily injuries and property damages.
b. You borrow your brother's car without his knowledge and he reports it to the police as stolen.
c. You buy a new stereo for $500. At a party one month later the receiver and speakers blow out. You return to the store and they tell you they are sorry but their stereos only have a two-week guarantee.
d. You decide to trade in your old car and buy a new one.
e. Your friends are caught robbing a local store, and they name you as one who helped plan the robbery.
f. The Principal suspends you from school for two days because of an article you wrote for the student paper criticizing the school dress codes.
g. You apply for a job and are turned down. You think you are rejected because of your sex.
h. You do not want your family to inherit the $10,000 you have saved. Told you will die within a year, you want the money to be used for cancer research.
i. You and your mate find that you can no longer get along. You want a divorce.
j. You earn $5,000 working in a restaurant during the year. You want to file your federal income tax return.

How Do You Find A Lawyer?

If you think you need a lawyer, how do you find one who is right for you and your particular problem? Perhaps the best way to find an experienced lawyer is through the recommendation of someone who has had a similar legal problem and whose lawyer resolved it to his or her satisfaction. You might also ask your employer, members of the clergy, businesspeople, or other professionals for the name of a lawyer they know and trust.

You can always find a lawyer by looking under "Lawyers" in the Yellow Pages of your phone book. In addition, *Martindale-Hubbell Law Directory*, available in your public library, lists most lawyers in the United States and provides some general information about their education, professional honors, and the type of cases they handle. As a result of a recent U.S. Supreme Court ruling, lawyers are now permitted to advertise their services. Depending upon where you live, advertisements for lawyers may be found in newspapers and magazines or on radio or television.

Another way to find a lawyer is to contact a lawyer referral service in your community. Local attorneys often organize into bar associations and maintain a list of lawyers who specialize in certain areas. Many of these lawyers are willing to consult and advise clients at a special rate. Anyone who calls the referral service will be told the amount of the initial consultation fee and will be given the name of a lawyer for an appointment. If additional legal service is needed, the fee is subject to agreement between the lawyer and the client.

A person who is unable to afford the services of a lawyer may be eligible for free legal assistance at a legal aid, legal service, or public defender office. These offices are usually listed in the Yellow Pages under "Legal Services." You may also contact the Legal Services Corporation or a local bar association or law school for the address of the legal aid office nearest you.

From *Street Law* Teachers Manual

SETTLING DISPUTES OUTSIDE OF COURT

Objectives (text pages 20-21):

After completing this section, students will be able to:

1. list, describe, and distinguish three methods for settling disputes outside of court;
2. analyze disputes in order to determine which method the parties should use to resolve the conflict.

Perhaps because of the emphasis in the media, lay persons tend to see courts as the principal means of solving disputes in our society. Many people criticize using courts to solve certain types of disputes and feel that Americans are too litigious. This section gives students an opportunity to examine other alternatives which either presently or might in the future exist to solve disputes. Using Special Project 6, Dispute Resolution Organizations in Your Community may assist in teaching this section.

Problem 9

In discussing each problem, students should realize there may not be one "best answer." Other variables which students should consider include: the availability of arbitrators and mediators, the presence of complicating issues (such as whether the couple wanting a divorce has a custody dispute), and time and money factors. See also the special project on dispute resolution at the end of this chapter.

a. This situation might best be handled by informal discussion between the father and daughter, or mediation by someone who knows and cares for both of them(*e.g.*, mother or other relative). Since open communication is an essential element of healthy family relations, it might prove detrimental to involve an outside third party or a formal legal mechanism. Furthermore, since a parent usually has no obligation to pay a child's college expenses if the child is no longer a minor, the daughter probably would not have a basis for legal action.
b. Before going to an outside agency, it would be advisable to speak directly to the store's owner (or the salesperson's supervisor). If this is unsuccessful, attempt to locate a consumer protection agency which can mediate the dispute. If this assistance is not available, you may need to go to small claims court. Some courts have arbitration programs for cases involving less than a certain amount of money.
c. The landlord and tenant should try to solve this problem through informal discussion or negotiation. If this proves unsuccessful, the next logical approach would be to request that a housing inspector investigate. If this does not resolve the dispute, check to see if your area has an agency which performs a mediation service. The landlord or tenant could also go to court or to a landlord/tenant commission if one exists in the area.
d. Labor disputes are often handled by arbitrators or negotiations between both sides. In some instances, the union and management will agree beforehand to submit disagreements to binding arbitration.
e. A couple desiring a divorce usually works out a negotiated settlement on their own or with the assistance of a lawyer. However, a divorce must ultimately be granted by a court.
f. You might begin your dispute settlement with the IRS through informal discussion. IRS has established procedures for settling disputes involving federal tax returns. If these procedures do not prove satisfactory, you might wish to hire an attorney. However, unless you qualify for legal aid, the attorney's fees might be more than the $200 in question.

THE ADVERSARY SYSTEM

Objectives (text pages 21-25):

After completing this section students will be able to:

1. explain the different burden of proof required in a civil case and in a criminal case
2. state at least two arguments in favor of and against the adversary process
3. list and describe the steps in a trial
4. distinguish between the role of judge and jury
5. explain the process of selecting a jury.

An understanding of our adversary system of justice will be important throughout the course. This is a topic you may wish to return to in later chapters. For example, the lay public may be critical of an attorney who represents a "guilty" person. However, the system requires that lawyers zealously represent their clients and not take on the roles of judge or jury.

Problem 10

a. There is no right answer to this question. The text lists several considerations for and against the adversary system. In addition to the points which are mentioned, students should think about the fact that the adversary system rests on the presumption that opposing lawyers are evenly matched. Since the outcome of the trial depends greatly on the skill and time commitment of the individual lawyers involved, and since lawyers' fees often depend on these two factors, the party with greater financial resources often has an advantage. On the other hand, the American system is designed to provide skilled representation to litigants, an objective third party (judge) to resolve disputes, a well developed set of procedural rules which attempt to fine-tune trials to achieve fairness, and an opportunity to appeal many decisions.

b. Make certain that students understand the quote. Then ask them to take a position (agree or disagree) and to support their position with reasons. In practical terms, the criminal justice system, with its very substantial burden of proof, operates in a manner consistent with the quotation. Guilty persons, technically, do not go free, because a person isn't guilty unless and until proven so (though, of course, some persons who commit criminal acts plead or are proven guilty and then are sentenced to probation or a suspended sentence). The quotation probably refers to defendants who are filtered out of the criminal justice system at some point (*e.g.*, police stop but do not arrest the person, an indictment is not returned, probable cause is not proven at the probable cause hearing). It is clear that some "morally guilty" persons go free. Relatively few totally innocent persons suffer convictions.

c. The Sixth Amendment requires effective assistance of counsel in criminal cases. An attorney should not represent a client whom he or she feels incapable of representing effectively. However, it is for the criminal process, not the lawyer, to determine the defendant's guilt. Lawyers should serve as advocates, not judges. The decision to represent should rest on issues other than the defendant's possible, or even probable, guilt.

Problem 11 omitted.

When Do You Need A Lawyer?

While *Street Law* is designed to help students identify and, in some cases, resolve legal problems, students should remember that certain situations require the assistance of counsel. In some instances it will be important to retain counsel early enough to avoid aggravating a problem once it occurs (*e.g.*, an arrest).

This section also introduces the concept of careful shopping, in this case for legal assistance. This concept is developed more fully in Chapter 3. While consumers sometimes have problems with goods they purchase, they may also experience problems with services such as legal assistance. The material in this section should make students mo careful, effective, and assertive consumers of legal servic

Problem 12

a. So long as your insurance company agrees to handle the cost of all personal injuries and property damage, there is probably no need to retain counsel. If you are sued for more than your insurance coverage, you may wish to hire your own attorney.

b. This problem can probably be resolved informally. Your brother can explain the situation to the police. However, if the police arrest and book you before the situation is clarified, you may want to retain an attorney for the purpose of seeking an expungement of your arrest record.

c. As students will learn in Chapter 3, the law implies a warranty which may run beyond the term of the written guarantee. The buyer in this case can seek assistance from local consumer protection agencies or sue in small claims court. An attorney is probably not required to secure redress.

d. Car buyers need good advice, but not necessarily from an attorney. Assistance in reading the contract of sale and the financing agreement may be available at your bank. A good mechanic's advice may also be invaluable.

e. You would definitely want an attorney in this situation since you will probably be charged with a serious crime. Even though you did not take part in the robbery, if the charges are true, you may be liable for criminal conspiracy, or as an accessory.

f. You don't have a constitutional right to an attorney in school suspension cases and you may not believe a two-day suspension is a serious enough matter to warrant an attorney. However, you may still want to hire one or find out if a Legal Aid Society or the American Civil Liberties Union will assist you. You'll also need to find out whether your school system will allow a lawyer to be present at the hearing.

g. Before hiring an attorney, you should contact EEOC (see index of student text) or a local human rights commission. They may be able to mediate a resolution of the problem. If they are unsuccessful, an attorney can help you bring suit.

h. You should go to a lawyer specializing in wills. If you do not have a valid will specifying that you want the money to go to cancer research, your estate will be distributed according to your state intestacy laws, which may result in your family's inheriting your savings.

i. If there are contested issues involved, such as child support, custody, alimony, or property division, you should consult an attorney. If there are not, you may wish to handle the divorce yourself. You should ask your family court clerk whether you can file the divorce papers *pro se* (in your own behalf).

j. You do not need a lawyer for filing your income tax return. If you have questions and want some free assistance, you can contact the Internal Revenue Service. In addition, several businesses offer tax preparation assistance for a charge.

2. What is a Contract?

from *Civil Justice*, the Constitutional Rights Foundation and Scholastic Book Service, 1978

This 224-page student text (with its companion volume *Criminal Justice*) explores "the concepts and processes of our legal system from the teenager's point of view." *Civil Justice* is built around five sections, on Consumer Law; Contracts; Housing Law; Family Law; and Damages, Injuries, and Insults. This illustrated text includes suggestions for action projects, field activities, the use of resource people, and a glossary. A teaching guide and set of "spirit masters" are available for each volume. The texts are published by Scholastic Book Service, 904 Sylvan Avenue, Englewood Cliffs, N.J. 07632, (201) 567-7900.

The following excerpts are from *Civil Justice*, Chapter 5: What is a Contract? and from the Teaching Guide. (Illustrations have been deleted.)

WHAT IS A CONTRACT:

"I'll give you twenty dollars for that saw!"
"Done!"

"Only $1.50 a week for two quarts of milk delivered to my home? Sounds good. I'll take it."

"If you let me have all the peaches I can pick from your tree today, I'll mow your lawn every week for a month."
"You're on!"

What do those three short scenes have in common? They are all examples of contracts. A contract is a promise that is backed by the law.

The buyer promises to pay $20 for the saw and the seller agrees. Under the law, both the buyer and the seller must now carry out their agreement.

The dairy promises to deliver two quarts of milk a week to the customer's home. The customer accepts and must pay $1.50 a week in return for the service.

A teenager promises to mow the lawn every week for a month in return for fresh peaches. The neighbor agrees. The lawn must be mowed and the peaches must be given.

As you can see, a contract doesn't always have to be written down. There don't have to be lawyers around. There don't even have to be any witnesses. All a contract takes is two parties—that is, two people who make a special agreement.

Is *any* promise a contract? Can you make contracts even if you are under 18? What happens if you have second thoughts about a contract? What can you do if someone breaks a contract with you? These are some of the questions we will explore in this unit.

1. AGREEMENTS AND THE LAW

A contract is an agreement that usually involves money, goods, or services. Like the three examples above, most contracts in everyday life are simple. They don't involve a lot of money, and often nobody minds too much if the contract is broken.

A friend offers to swap a record album with you, and you agree. Later, the friend calls you and says he's changed his mind. Maybe you're a bit annoyed, but you just shrug your shoulders. You don't think of calling a lawyer.

Still, even simple contracts are backed by the law. And each party can insist that the contract be kept. For example:

You offer a neighbor $25 for his old CB radio. He accepts your offer. You give him $5 and go home to get the rest of the money. When you return, the man says he wants to sell the CB to someone else who will pay $50 for it.

The contract you have made with the neighbor protects you. Since he agreed to sell the CB to you, he cannot just change his mind. If he does, you have the right to take legal action.

Field Activity

Make a list of all of the agreements you observe or take part in during any one day. Write these headings on a piece of paper: Location (where the contract was made); Description; Parties (the people making the contract). For example: "Drugstore. Someone orders milk shake (that is, promises to pay for it). Customer and drugstore clerk."

Look at the examples of contracts on page 59 and compare them with the agreements you have listed. Which of the agreements on your list do you think are legal contracts? Put a check mark against each of these.

2. WHAT MAKES A PROMISE A CONTRACT?

Do all promises form contracts? No — only some do. In both stories below, a promise is given. But one of the promises becomes a contract while the other does not. See if you can tell which is which.

Story No. 1

Larry is excited. "We're moving to the west coast," he tells his best friend Jerry. "I can't take a lot of stuff with me so I'll give you my record collection."

"I accept," Jerry says happily. He is sorry Larry is leaving but there are some great LPs in the collection.

"By the way," Larry adds, "do you think you can come by on Saturday and help me pack? You can pick up the records then."

"Sure thing," Jerry answers. "And thanks, Larry."

Story No. 2

Larry is excited. "We're moving to the west coast" he tells his best friend Jerry. "I can't take a lot of stuff with me so I'll give you my record collection if you'll come over and help me pack on Saturday."

"I accept," Jerry says happily. "And thanks, Larry."

Which of the two stories do you think contains the contract? Why?

Story No. 2 is the one with the contract. In both stories, Larry offers Jerry his record collection and asks Jerry to help him pack. But only in No. 2 does Larry ask Jerry to help him pack *in return for* the records. When Jerry accepts this offer, there is a contract.

In most cases, a contract must contain three things:

- an offer;
- acceptance;
- consideration (something in return).

On the following pages we will find out more about each of these.

The offer

An offer is a promise to do something in exchange for something else.

"I'll give you my record collection," is not an offer. No exchange is involved. In Story No. 1, Larry simply makes a gift of his records. He asks Jerry to help him pack and Jerry agrees. But that is not a condition of the gift. Larry says he will give the records to Jerry whether he helps pack or not. So there is no legal obligation on either of them. Larry can change his mind and keep the records—even if Jerry helps him pack. Or Jerry can accept the records even if he does not help with the packing.

"I'll give you my record collection if you help me pack," is more than a promise. In Story No. 2, Larry promises to give Jerry the records only in *exchange* for Jerry's help. This is an offer. When Jerry accepts it, a contract is made. If Jerry helps him pack, Larry has a legal obligation to give him the record collection as promised.

Suppose Larry had said to Jerry, "Maybe I should give my record collection to someone in return for helping me pack. If I decide to do that, would you be interested?" Would that be an offer? No. If Jerry said, "Yes," Larry could still change his mind and not make the offer. To create a contract, an offer must be definite.

Now suppose Sally offers to sell Karen her bike for $15 and Karen says she wants to think it over. Sally also thinks it over and phones Karen that evening.

"Sorry, Karen, but I've decided not to sell my bike after all."

"That's too bad!" says Karen. "I'd just made up my mind to buy it."

But Karen is too late. Sally has withdrawn her offer, and it no longer holds good. An offer can be withdrawn any time before it is accepted.

Suppose Karen had called first, accepting the offer. In that case, it would be too late for Sally to change her mind. Once an offer is accepted, it can no longer be withdrawn.

An offer may include a time limit. Sally could have said: "I'll sell you my bike for $15. But you have to let me know by eight o'clock this evening." If Karen doesn't call until five past eight, the offer no longer stands.

Your turn

Look at each of the examples of offers given below. Decide which of these offers could form a contract if accepted and which could not.

1. Mr. Jones says to Mr. Brown, "I will sell you all the tools in my garage for $200."

2. Janice says to Lois, "I've been thinking about selling my skis. If I decide to sell them for $25, would you be interested in buying them?

3. Marilyn says to David, "I'm going to give you my old geometry book. Will you take it?"

4. Mrs. Arliss says to Lois, "I'll pay you $2 an hour to weed my garden."

Look again at each of the offers which could *not* form a contract if accepted. What changes would turn them into contractual offers?

The acceptance

When there is an offer, it must be accepted as is to make a contract. In other words, the offer must be accepted on all its terms. For example:

Mary Ellen receives a letter in the mail. The letter reads: *I will sell you my goat for $30. Let me know if you wish to buy it.*

Mary Ellen decides to buy the goat and writes immediately to say so. She accepts the offer as is and a contract is made. The owner must sell the goat for $30 and Mary Ellen must buy it for that amount.

Suppose Mary Ellen had answered the letter differently, like this:

I like the goat and will pay you $30 but I want a month's feed thrown in too for that price. Enclosed is my check for $30.

Would there be a contract? No, because now Mary Ellen does *not* accept the offer as is. An offer cannot be accepted in part. It must be accepted exactly as is or else it is rejected.

Mary Ellen is making what is called a "counter-offer." This creates a new contract situation, one in which Mary Ellen makes the offer. She is offering $30 for the goat and a month's worth of feed. It is now up to the owner to decide whether to accept *her* offer.

Meeting all conditions

An offer may contain various conditions. It may say how soon an answer must be given, or how soon payment must be made. A person accepting the offer must also accept all of these conditions, or else the offer is rejected. For example:

Suppose the owner of the goat had said, "If you wish to accept my offer, you must be at my farm in person at 3:00 p.m. on Tuesday, November 14th, with $30 in cash." Mary Ellen would have had to follow all of these terms. If not, she would have rejected the offer.

However, suppose the goat owner had simply asked Mary Ellen to let him know by return mail. In that case, she could probably reply by any equally quick (or quicker) means. It would probably be all right for her to telephone her acceptance or to go directly to the goat owner's home.

Your turn

Look at each of the examples of acceptances given below. Decide which of these would create a contract and which would not.

1. Janice sends a telegram which read, "As you requested, I am cabling my acceptance of your offer. I agree to pay $75 for your freezer."

2. Ms. Smith offers to sell Mr. Willis an interest in her land if he accepts in person at her office by 10:00 a.m.

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Thursday. Instead, Mr. Willis mails a letter of acceptance late Wednesday evening.

Louise says to Anna, "Yes, I agree to help you with your math in return for a dinner at 'Le Gourmet'—but I wonder if you'd consider throwing in that brown dress you don't wear anymore, too?"

4. Mrs. Wandaman asks Mr. Jones to let her know by return mail whether he accepts her offer to sell her sofa. Mr. Jones sends a messenger with an acceptance and a check as soon as the offer is received.

Look again at those acceptances which do not lead to a contract. Why not? What changes would make them lead to a contract?

The consideration

We have seen that an offer is a promise to do something in exchange for something else. This "something else" is known as *consideration.* After an offer is accepted, consideration must be given or there is no contract.

Consideration may be money, goods, work, or some other action. But the person accepting the offer must, now or later, give or do *something* of value. Otherwise the person making the offer does not legally have to keep his or her promise.

Some examples will make this clear. When Mary Ellen accepted the offer of a goat, the consideration was money—$30 which she paid later. When Jerry accepted Larry's offer of the record collection, the consideration was work—helping Larry to pack on the following Saturday.

Here's another example. Mrs. James says to her 16-year-old son, "You are old enough to have a driver's license. But I'd feel happier if you didn't drive until you are older. I will buy you a car when you are 21 if you don't drive until that time." Her son accepts and does not drive for five years. Is his mother legally bound to give him a car? Is there a contract?

Yes. The consideration is the son's action of *not* driving. This is something of value of his mother. It is also something he can choose not to give if he does not wish to.

The person accepting the offer must be able to choose whether or not to give the consideration. If there's no choice, there's no contract. For example:

Suppose Mrs. James says, "Son, you are now 16 years old. Because of the help you've given me over the years with the other children, I'm going to give you a car."

Mrs. James would be offering her son a gift in return for something he had already done. There is nothing now he can choose to give or not give. So there is no legal contract.

Now suppose the person to whom the promise is made has to give the consideration anyway. Again, there is no choice and no contract. For example:

Suppose Mrs. James puts her offer a little differently. She says, "Son, if you obey the traffic rules and don't get any tickets until you are 21, I will buy you a new car on your 21st birthday."

In this case, Mrs. James is asking for something her son already has to do under the law. With or without her promise, he must obey traffic rules, so Mrs. James would *not* be legally obligated to buy him a car.

Your turn

Here are some examples of offers. Look at the consideration involved in each. On the basis of what you have just read, decide which offers could make a legal contract and which could not.

1. Don says to Anna, "I will pay you $3 if you will take my car to the car wash before five this afternoon." Anna agrees.
2. Mrs. Williams says to Lois, "Because you have such a nice voice, I promise you will be the one to sing a solo at graduation."
3. Mr. Grant says to his daughter, "If you promise not to drink alcohol until you are legally of age, I will send you on a trip to Europe for your 21st birthday."
4. Mrs. Moore says to Lewis, "You've always done a good job on the lawn, so if you mow it for me before 3:00 p.m. today I'll give you $5."

Look again at those examples which have the wrong kind of consideration for a contract. What changes would make them the right kind?

3. IS THERE A CONTRACT?

Each of the following is an actual contract case. Read each to decide whether you think a legal contract does or does not exist. Remember, a contract must contain:

1. a definite offer;
2. unconditional acceptance;
3. the right kind of consideration.

Scott v. People's Monthly

People's Monthly, a magazine, announced a "Word Building Contest." The contest offered a first prize of $1,000 to the person who created the largest list of words from the letters in "determination."

A list of rules went with the contest offer. Contestants could not use certain kinds of words, such as abbreviations.

Mrs. Scott sent in the longest list of words. Yet she did not win the contest or the $1,000 prize. She took *People's Monthly* to court. She argued that she created the longest list and was therefore entitled to the first prize.

People's Monthly agreed Mrs. Scott's list was longest. However, it pointed out that some of her words fell within the word types prohibited by contest rules. It therefore argued that she was not entitled to the first prize.

Your turn

1. Do you think a contract exists in this case? Why?

2. If you were deciding the case, would you decide in favor of Mrs. Scott or *People's Monthly?* Why?

Hamer v. Sidway

A wealthy man promised to pay his nephew $5,000 if he did not smoke or drink until he was 21. The nephew agreed. Although he was legally entitled to smoke and drink, he did not do so until he was 21. Then he asked his uncle for the $5,000 promised. The uncle refused to pay. The nephew sued.

The uncle argued that his nephew had not exchanged anything of value in return for the promise. In fact, he claimed that the nephew had actually gained a benefit by not smoking or drinking. That meant there was no consideration and therefore no contract.

The nephew disagreed. He argued that he *had* given up something of value in return for the promise of $5,000. This "something" was his legal right to smoke and drink.

Your turn

Do you think a contract exists? If you were a judge, how would you rule?

Your teacher can tell you the decisions in these cases. They are on page 157 of the Teaching Guide.

Another look

Now that you know more about what makes a contract, look at the list of agreements you were asked to make on page 153. Check your examples carefully. Which of them actually include offer, acceptance, and consideration? Which do not? Strike out those agreements which you do not consider to be legal contracts.

4. WRITTEN CONTRACTS

All contracts *may* be put in writing, but most are legal even if they are not written down. In our daily lives, contracts are usually spoken. A pizza parlor would lose time and business if it asked its customers to put their orders in writing.

However, certain kinds of contracts *must* be in writing. As we will see, there are good reasons for this.

Before the late 1600's there were no laws in England or the American colonies requiring written contracts. So people could claim that they were parties to contracts which did not exist, and there was often no way to prove them wrong. These claims could involve large amounts of money or land. They could cause a lot of trouble to many people.

In 1677 the English Parliament passed a law known as the Statute of Frauds. This statute is the basis of many of our state laws today. Under these laws, no legal action can be taken on certain contracts unless the parties have signed a written agreement.

What kinds of contracts must be in writing? Usually, those that involve large amounts of money or goods. For example, in most states a contract must be in writing if it involves:

- the sale of goods worth more than a certain amount (usually from $50 to $500, depending on the state); or
- the sale of real estate.

In addition, contracts with certain complicated terms must be in writing. These usually include contracts which:

- cannot be completed in less than one year;
- promise to pay the debt of another person.

From *Civil Justice* Teaching Guide

CHAPTER 5: WHAT IS A CONTRACT?

Objectives

After reading this chapter, students should be able to:

1. identify and explain the essential elements of a legally enforceable contract;
2. identify and explain examples of contracts arising in daily life;
3. distinguish between contracts, simple agreements, and promises;
4. analyze specific situations to determine whether a legally enforceable contract exists.

Getting Started

Write each of the three short scenes presented in the introduction to Part Two of the student text on the chalkboard. Explain that each is an example of a contract. Then guide students in developing a tentative definition of *contract* by asking them to compare and contrast the three scenes: *How is each of the scenes alike? How is each of the scenes different?* Students should determine that in each a promise is made by one person and accepted or agreed to by another, although each concerns a different subject and different people. Ask students to suggest examples of common contract situations in their own lives. They may suggest simple contracts involving parents and children, teachers and students, buyers and sellers. Explain that while we often think of such contracts as simple agreements, many are legally enforceable, and that in the following pages they will find out more about what makes a legally binding contract.

Agreements and the Law

Have students read the section to themselves. *Why might it be necessary to make certain contracts legally enforceable? What might happen if no contracts were enforceable in a court of law?*

Field Activity

The field activity is designed to help students identify some of the areas in which contracts arise in their daily lives.

After the field activity, divide the class into small discussion groups to examine each of the contracts listed by the students. Encourage them to decide which of those listed are examples of legal contracts and which are not. Ask each group to present its examples to the class so that they can be discussed, compared, and contrasted. Keep a record of the students' lists of contracts, as they will have the opportunity later in the chapter to check their examples and tentative decisions.

What Makes a Promise a Contract?

Ask students to read and compare the two stories. *How are the two stories alike? How are they different? Why do you think Story No. 2 contains a contract while No. 1 does not?* Students may suggest that the second story involves something in return while the first does not. There are three essential elements in a contract—offer, acceptance, and consideration (something in return)—and these are dealt with in turn in this section. *What is an offer? What is meant by a definite offer? When does an offer end?* Ask students to consider individually, as a class, or in small group discussion, which of the examples presented under *Your Turn* on page 154 of the student text would form valid contracts if accepted. Some students should be able to determine that examples 1 and 4 would create valid contracts if accepted.

Example 2 would not be valid because it is not definite.

Example 3 would not be a valid offer because a gift is being given and nothing is asked in return. *What is acceptance? If a person basically accepts an offer but wishes to make a few conditions, is the acceptance valid? At what point is an offer accepted?* Ask students to consider the examples in *Your Turn* on page 154. Examples 1 and 4 are valid acceptances. Example 2 could be a valid acceptance if it meets with Ms. Smith's approval. However, if she chose to, she could probably hold Mr. Willis to the specific terms of acceptance stated in the offer. Example 3 is not a valid acceptance because the offer is not accepted unconditionally. In fact, a counter-offer is made. *What is consideration? What is an example of consideration? What is an example of non-consideration?* Ask students to consider the examples under *Your Turn,* page 156. Examples 1 and 4 include sufficient consideration. Example 2 shows no valid consideration because there is no choice: Lois does not have to give up anything of value. She has been selected on the basis of her demonstrated ability. In example 3, Mr. Grant promises to reward his daughter for doing something she is legally obligated to do. She has no choice. Therefore, there is no consideration.

Is There a Contract?

At this point, students should be able to apply their understanding of offer, acceptance, and consideration to two actual court cases (*Scott v. People's Monthly, Hamer v. Sidway*) to determine, 1) whether a valid contract exists, and 2) how each case should be decided. You may wish to discuss and decide each case as a class activitiy, a small group activity, or an individual written exercise. Both cases are also suitable for role-playing.

The Outcome: *Scott v. People's Monthly.* The court decided the case in favor of *People's Monthly.* There was never a valid contract because Mrs. Scott failed to accept the terms of the offer unconditionally. Therefore, she was not entitled to the prize regardless of how many words her list contained. The conditions of the offer required that certain types of words not be used. She used some of these word types. Therefore, she did not accept the terms of the offer.

The Outcome: *Hamer v. Sidway.* The court decided the case in favor of the nephew. The nephew accepted the uncle's offer and as consideration gave up something of value—his legal right to smoke and drink. Regardless of whether giving up these things was beneficial to his health, he made the choice and met the conditions of the offer. He was therefore legally entitled to the money promised him by his uncle. There was a binding contract.

After students have decided and discussed the two cases, advise them to refer back to the *Field Activity* "list of contracts." Ask them to review and correct their lists in the light of the new information they have about what constitutes a valid contract.

Written Contracts

This section introduces the Statute of Frauds (a law passed by the English Parliament in 1677 and basically followed in almost all of the states today) which requires that certain types of contracts must be in writing to be valid. These include contracts involving 1) the sale of goods worth more than a specified amount of money, 2) the sale of real estate, 3) contracts which cannot be completed in less than one year, 4) promises to pay the debt of another.

What Kind of Contract is Needed?

Students are asked to analyze four contract situations to decide what type of contract might be required or desirable for each situation. This is suitable for an individual written exercise, a small group activity, or a class activity. While a written contract would be required under the Statute of Frauds in most states for example 2 (cannot be completed in less than a year) and example 4 (promise to pay off the debt of another), the type of contract desirable in the remaining situations is a matter of personal preference.

Resource Person

As a supplementary activity, your students may wish to invite an attorney specializing in contracts to visit the classroom. Local bar associations often have lists of attorneys who are involved with student groups. Well in advance of the visit, send the attorney the list of questions or topics which will be the focus of the visit. Encourage students to formulate their own questions which reflect their own interests and concerns.

3. Corrective Justice: A Conceptual Approach

from *Justice*, Law in a Free Society, 1979

The Law in a Free Society (LFS) curriculum is based on eight concepts considered fundamental to our democratic society: Authority, Privacy, Justice, Responsibility, Participation, Property, Diversity, and Freedom. LFS is developing multimedia instructional units on each of these concepts which "progress sequentially in scope and complexity through six levels, from Level I for kindergarten/grade 1 to Level VI for grades 10-12." The curriculum is designed to increase student understanding of the legal and political institutions and values of our constitutional democracy. Each multimedia unit includes color filmstrips with audio cassettes, student books, and a teacher's edition. The materials may be obtained from Law in a Free Society, 5115 Douglas Fir Drive, Suite I, Calabasas, Cal. 91302, (213) 340-9320.

LFS materials on Justice illustrate their conceptual approach to law-related education and focus on three areas: Distributive Justice, Corrective Justice, and Procedural Justice. The following excerpts concerning Corrective Justice are from the Level VI, Teacher's Edition for grades 10-12.

APPLYING THE INTELLECTUAL TOOLS TO AN ISSUE INVOLVING GOVERNMENTAL CORRUPTION

(from Teachers' Edition)

Lesson Overview

This lesson provides students an additional exercise that requires applying intellectual tools to a hypothetical situation involving an issue of corruption in local government; it is followed by a brief evaluation exercise. Students read a case in which city inspectors and building contractors are involved in bribery and illegal payoffs. Using the chart on Intellectual Tools (p. 162) to guide their analysis of the situation, students are asked to develop and support positions on proper responses to the resulting wrongs and injuries. Alternative teaching procedures include individual completion of the exercise or the role-playing of hearings before a mayor's task force established to investigate the problem and develop proper responses.

The evaluation exercise requires students individually to develop written positions on any of the issues of corrective justice contained in the unit or on other issues that may be identified and selected with the approval of the teacher.

Lesson Objectives

Given a situation involving governmental corruption and a chart containing the intellectual tools, students should be able to:

1. Fill in the correct information on the Intellectual Tools chart (p. 162), using the information contained in the selection.

2. Develop, support, and evaluate positions on proper responses to the wrongs and injuries contained in the selection.

Student Materials

Student Book, Unit Three, Lesson 12: "A Scandal," (p. 160)

Teaching Procedures

Reading and Discussion: Identification and Analysis of Wrongs and Injuries, and Development of Positions on Proper Responses

Have students read the directions and the selection, "A Scandal," in Lesson 12 of the Student Book. Then use one of the alternative teaching procedures suggested below to implement the lesson.

Alternative A., Individual and Class Work

Have students read the selection individually, then use the first step on the chart to guide them in the identification and analysis of wrongs and injuries it contains. List those identified on the board. Next, use the chart to direct students in a step-by-step analysis of the situation as the basis for a class discussion of proper responses. As a variation on this approach, students might be asked to individually write their positions on proper responses after a suitable class discussion.

Alternative B, Role-Play of Hearing

In preparation for role-playing a hearing before a mayor's task force established to investigate and develop proper responses for the problem, students may be divided into four groups. One group should be assigned to play the part of the task force. The remaining three groups should each be assigned the responsibility of using their charts to develop positions to present to the task force on what they think would be the most proper response to the wrongs and injuries contained in the selection. After suitable preparation time has been allowed, spokespersons for each group should make their presentations to the group role-playing the task force. Members of the task force should be allowed to question presenters at any time during or after their presentations. After presentations have been made, the task force should deliberate and, in consideration of the preparations made, develop and support a position on the issue.

Lesson 12 *(from Student Book)*

WHAT WOULD BE PROPER RESPONSES TO THESE WRONGS AND INJURIES?

A Scandal in City Government

Directions: *Read this selection; then:*

- *Try to identify what wrongs and injuries were caused by some of the officials of the Bay City government.*
- *Use the chart that will be provided to develop positions on what responses would be desirable.*

You may be asked to report your positions independently or the class may be divided into groups to role-play meetings of a mayor's task force assigned the responsibility of investigating the scandal and recommending what should be done. Instructions to the mayor's task force are given following the newspaper article.

***News Item In Bay City* Gazette**

EXTRA EXTRA EXTRA

WIDESPREAD CORRUPTION UNCOVERED IN BAY CITY

A *Gazette* Exclusive

Bay City — The *Gazette* has learned of widespread corruption on the part of Bay City officials. Dozens of incidents involving bribe-taking and illegal payoffs to city inspectors have been documented. City departments involved include: the Fire Department, the Building Code Office, and the Health Commission. Also implicated are a number of state-licensed building contractors.

In order to investigate the rumors of corruption, the *Gazette* provided funds and authorized reporter Myrta Ramirez to purchase a run-down snack shop. She completed a few repairs, but left many serious building and health code violations. Then, the reporter contacted Robert Manning, a state-licensed building contractor.

Ms. Ramirez asked Mr. Manning if he could arrange the necessary inspections to satisfy the city's building, health, and safety codes.

Mr. Manning told her that he would be glad to "run things through the city" if she first paid him his "fee." After Ms. Ramirez paid Mr. Manning a sizable amount in cash, he gave her some of his business cards. He explained that whenever an inspector came to the premises, she should put $100 in an envelope along with his business card and give it to the inspector. "If you do that, you won't be hassled," he promised.

The first inspector to come to the shop was from the Fire Department. Ms. Ramirez gave her an envelope and she checked its contents. Then, ignoring a number of serious fire hazards, the inspector filled out a department form stating that the snack shop was safe for occupancy.

Ms. Ramirez followed the same procedure each time an inspector came to the shop. Each supplied the needed verification once he or she was given an envelope. Not one of these city employees conducted a thorough inspection or ordered Ms. Ramirez to make any changes in the conditions of the shop.

After the events described above, the *Gazette* invited the heads of each of the departments involved to meet Ms. Ramirez at the snack shop. Each department head was asked to make a thorough examination of the shop for code violations. They made detailed inspections and noted a total of thirty-eight serious code violations. The department heads who participated in the inspection agreed that the snack shop constituted "a serious hazard to public health and safety."

Instructions for Role-Playing a Meeting of a Mayor's Task Force

Within a week after publication by the *Gazette* of the story about corruption in Bay City government, the mayor appointed a task force to examine the problem and make recommendations about what responses should be made to the wrongs by the mayor's office or other government agencies. If your class is divided into groups for this lesson, each group, acting as a task force, should:

1. Read the *Gazette* article.
2. Read the witness summaries below.
3. Recommend what response should be used for each of the persons described in the witness summaries.
4. Be prepared to explain recommended responses to the entire class.

The following witness summaries were taken from transcripts of hearings already held by the mayor's task force:

Robert Manning, Testimony taken February 4. Afternoon session.

The witness is 62 years old, married, and the father of four children ranging in age from 11 to 26 years old. He is the possessor of State Contractor's License #15683-A. He has been a state contractor for nearly 35 years.

Mr. Manning acknowledged that he has personal assets in excess of one million dollars, but would not give details as to how these were acquired.

State records indicate that Mr. Manning was suspended from contracting activities in 1950 for a period of six months. The suspension resulted from his supplying faulty building materials on a housing contract. There are no other prior criminal or professional violations.

In giving his testimony, Mr. Manning admitted he had done what was described in the news article, but seemed genuinely surprised at the uproar resulting from the *Gazette* series. He expresed the belief that his conduct was not in any way unusual. "It's just Bay City," he said. "I've been a contractor here for over 30 years and that's the way things have always been done and always will be."

Donald R. Duchinsky, Department Head, Building Code Office. Testimony taken February 5. Morning session.

Mr. Duchinsky is 47 years old and divorced. He has been employed by the city for 17 years. He has held his present position for the last eight years. His current salary is $24,000 per year.

Mr. Duchinsky has a good civil service record and was rated as "excellent" in his last personnel evaluation. He has no prior criminal record.

In his testimony, Mr. Duchinsky stated, "I knew nothing about the alleged acts of people in my office. Maybe I should have known, but I didn't."

Then Mr. Duchinsky was reminded that last year the mayor had asked him to look into complaints about bribe-taking by building code inspectors. The department head shrugged his shoulders and said "I asked a few of my people about it. They said no one was taking bribes. When you've been in city government as long as I have, you learn not to ask too many questions."

Jeanine Lepere, Bay City Fire Officer. Testimony taken February 5. Morning session.

Officer Lepere is 23 years old and the mother of two children. Her badge number is 352436. She has been an inspector with the Fire Department for two years. Her personnel record with the department is very good. She has no prior criminal record, but was once suspended from Bay City High for two weeks for cheating on an exam.

In her testimony, Officer Lepere admitted that she had taken bribes. "Look," she said, "I know it's wrong. When I started with the department, I never took a bribe. But then I saw the other inspectors taking them and nobody seemed to care. I'm alone and I've got two kids to think about, and a Fire Department salary doesn't go very far. So I figured that if I took a few bribes my kids would have decent clothes to wear."

During the February 6 morning session, Officer Lepere delivered a letter to the task force. The letter stated that she would testify about bribe-taking by other inspectors if the task force would recommend that she not be prosecuted for taking bribes.

What Do You Think?

1. What responses did your group recommend to the Mayor's task force and the city council?

2. Did all the groups agree on the same responses for the wrongs and injuries described in the Gazette *article?*

3. How fair are the suggested responses? Justify.

4. Will the responses suggested correct the wrongs or injuries?

5. Will the responses suggested prevent further such wrongs or injuries?

Alternative C, Panel Hearing *(from Teachers' Edition)*

Alternative B may be followed, with the exception being that the task force may be composed of adults from various occupations invited to the class for this purpose. Such persons might include members of a local government agency, social scientists, attorneys, housewives, local business persons, and employees.

Optional Activities

For Reinforcement, Extended Learning, and Enrichment

1. Have students research other examples of issues of corrective justice in relation to officials in public office, and ask them to identify the wrongs or injuries and evaluate the responses made.

2. Ask students to attend a court trial session at a time when sentencing is to be imposed and report the experience to the class.

Intellectual Tools to be Used in Dealing with Issues of Corrective Justice

Wrong or Injury	Possible Responses
1. Identify the Wrong or Injury a. What was the wrong, if any? What was the injury, if any?	
b. How serious was the wrong or injury? (1) *Impact:* How extensive was the impact? How many people were involved, how much property, how much land, how many plants, animals, or other things of value were affected?	
(2) *Duration:* Over how long a period of time did the wrong or injury take place?	
(3) *Extent:* How great an effect did the wrong or injury have? (scratch or loss of life or limb?)	
(4) *Offensiveness:* How offensive was the wrong in terms of your sense of right and wrong, human dignity, or other values?	
2. Identify the Relevant Characteristics of the Person Causing the Wrong or Injury a. *State of Mind:* (1) *Intent:* Did the person act intentionally or purposely to bring about the wrong or injury?	
(2) *Recklessness:* Did the person deliberately or consciously ignore obvious risks in causing the wrong or injury?	
(3) *Carelessness:* Did the person act in a thoughtless manner, paying inadequate attention to the possibility of a foreseeable wrong or injury?	
(4) *Knowledge of Probable Consequences:* Did the person know, or should the person have known that what he or she was doing might cause a wrong or injury?	
(5) *Control:* Did the person have physical/mental control over his or her actions?	
(6) *Duty or Obligation:* Did the person have a duty or obligation to act, or refrain from acting, as he or she did?	
(7) *Mitigating Circumstances:* Did the person have more important values, interests, motives, or responsibilities that caused him or her to act in a certain way?	
b. *Past History:* What facts about the person's past history are relevant to deciding upon a proper response?	
c. *Character and Personality Traits:* What facts about the person's character are relevant to deciding upon a proper response?	
d. *Feelings After Causing a Wrong or Injury:* What were the person's feelings after having caused the wrong or injury, *e.g.*, sorrow, remorse, pleasure, apathy?	
e. *Person's Role in Causing the Wrong or Injury:* Did the person act alone, as a leader, an accomplice, an unwitting accomplice?	

NOTE: Law in a Free Society grants to users of these materials the right to reproduce the pages of this chart.

Wrong or Injury	Possible Responses
3. Identify Relevant Characteristics of the Person Wronged or Injured a. *Contribution:* Did the person contribute to causing the wrong or injury he or she suffered?	
b. *Ability to Recover:* How able is the person to recover from the wrong or injury?	
4. Identify Common Responses to Wrongs and Injuries and Their Purposes a. *Inform:* Should the person be informed of what he or she did that was wrong or injurious? Why?	
b. *Overlook or Ignore:* Should the wrong or injury be overlooked or ignored? Why?	
c. *Forgive or Pardon:* Should the person be forgiven or pardoned for causing the wrong or injury? Why?	
d. *Punish:* Should the person be punished?	
e. *Restore:* Should the person be required to restore what was taken or damaged?	
f. *Compensate:* Should the person be required to compensate in one way or another for causing the wrong or injury?	
g. *Provide Treatment or Education:* Should treatment or education be provided? Why?	
5. Consider Related Values and Interests a. *Corrective Justice:* What responses would result in a correction of the wrong or injury?	
b. *Deterrence and/or Prevention:* Which responses may deter the person from causing further wrongs and injuries and prevent others from similar acts?	
c. *Distributive Justice:* What responses have been made to others who have caused similar wrongs or injuries?	
d. *Human Dignity:* What beliefs about human dignity should be taken into account in deciding what would be a proper response?	
e. *Preservation of Human Life:* What responses will be most likely to preserve the life of the wrongdoer and the lives of members of society? Should the life of the wrongdoer be taken to preserve and protect the lives of others?	
f. *Efficient Use of Resources:* How costly are various responses in terms of available resources?	
g. *Freedom:* How do various responses affect the freedom of the wrongdoer and other members of society? How can limitations on the freedom of the wrongdoer be justified?	
h. *Proportionality:* What responses would be reasonable in relation to the seriousness of the wrong or injury?	
i. *Revenge:* What responses might satisfy the desire for revenge?	

What Do You Think?

1. What would be proper response(s) to the wrongs and injuries identified?

2. Are the responses you suggested designed to correct the wrong or injury?

3. Are the responses you suggested designed to prevent further wrongs or injuries?

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4. The Right to Petition the Government for Redress of Grievances

from *The Idea of Liberty: First Amendment Freedoms,* Isidore Starr, West Publishing Co., 1978

This 234-page student text presents scholarly material in a format that is being used in high schools. Featuring the case method, the book examines each phrase of the First Amendment through great cases the United States Supreme Court has decided. Thus its six sections explore the meaning of separation of church and state, religious freedom, freedom of speech, freedom of press, the right to assemble peaceably, and the right to petition for redress of grievances. The sections include historical background material, information about leading justices of the Court, and questions for classroom discussion. The book is available from West Publishing Co., 170 Old Country Road, Mineola, N.Y. 11501, (516) 248-1900.

The following excerpts are from Section VI, The Right to Petition the Government for Redress of Grievances.

SECTION VI: THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES

Introduction

Petitions are a common method of protesting conditions and requesting government cooperation. People have petitioned local, state, and national government on such matters as traffic lights, parks, busing of students, taxes, environmental problems, consumer affairs, nuclear plants, foreign policy, and a variety and multiplicity of other issues. Petitions have taken the form of written statements, delegations of citizens, and protest marches.

The right to petition for redress of grievances, like the other First Amendment Rights, was not handed down to us on a silver platter. There were times in history when such petitions were regarded as seditious and criminal. In some countries today citizens would not think of petitioning for redress of grievances because to do so would invite the heavy hand of governmental retaliation.

Even for Americans, this right is not always welcomed or used. For example, Irving Brant, in his book on *The Bill of Rights,* relates that on July 4, 1951, the *Capital Times,* a newspaper in Madison, Wisconsin, the home of the University of Wisconsin, decided to try an experiment to test the attitude of citizens toward a great American document. A petition was prepared declaring that those who signed it believed in the Declaration of Independence. Reporters then asked people on the street chosen at random to sign the petition. Only one person agreed to sign out of 112 interviewed. What reasons did they give? Many feared that they would lose their jobs, or be called Communists, or that it was a subversive document.

When the *New York Post* tried it, only 19 out of 161 were willing to sign. Among the reasons given were "suspicion, distrust, and hostility."

It is unfortunate that so few Americans know the history of this great right. Stated in the *Magna Carta* of 1215, one of the foundation stones of the liberties of Englishmen, this right to petition was used against King Charles I in the famous document, *The Petition of Right.* In 1689 the right to petition was incorporated into the English Bill of Rights with these resounding words:

> That it is the right of subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

The American colonists, appealing to the rights of Englishmen, used the right to petition to protest their grievances against George III and Parliament. When the Declaration of Independence was written, one of the grievances against the British Government was stated as follows:

> Our repeated Petitions have been answered only by repeated injury.

Incorporated into the First Amendment of the Bill of Rights, this right has been used throughout American history by those who have understood the uses of this form of protest. As we have seen above, some—perhaps too many—people regard the placing of their name on a document of this type as an act fraught with dire consequences. In some communities this may be so. As we shall see, however, more and more people seem to be resorting to the mass protest and the march as a more effective and less threatening means than signing a petition.

Two sensational historic examples of the right to petition were Coxey's Army and the Bonus March. Coxey's Army was a "living petition" of several hundred unemployed who marched to Washington, D.C., in 1894 to persuade the government to supply jobs for the unemployed. The Bonus Army of unemployed veterans marched to Washington, D.C. in 1932 to petition Congress for immediate payment of their promised bonuses. Both marches were unsuccessful.

Two points should be noted. Originally the right peaceably to assemble was joined to the right to petition for the redress of grievances. As we have seen, in time the right to assemble peaceably became recognized as a distinctive right with justification for the recently recognized constitutional right of association. The right to assemble peaceably is also intimately connected with freedom of expression. Inevitably, all the rights in the First Amendment are interconnected since they represent the touchstone of sincerity relating to respect for the dignity and integrity of the individual.

Today, the right to petition often takes the form of lobbying—trying to persuade government officials to pass laws favorable to the lobby or to kill bills harmful to the lobby. Lobbying is a lawful activity and in some jurisdictions lobbyists have been required to identify the interests they represent.

Case 73: A Sit-In in a Public Library

The public library in Clinton, Louisiana, was segregated. On March 4, 1964, Brown and four other blacks decided to protest this discriminatory policy by "sitting in." They sat down in the library and refused to leave when the librarian asked them to do so. When the sheriff arrived, about 10-15 minutes after the sit-in had started, and asked them to leave, they again refused and were arrested and convicted of the breach of the peace law which read:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others . . . in . . . a . . . public place or building . . . and who fails or refuses to disperse and move on, when ordered to do so by any law enforcement officer . . . or any other authorized person . . . shall be guilty of disturbing the peace.

The library is a place for reading, study, and contemplation. Should this type of protest be allowed? The State contended that Brown and his friends were loafing and making a nuisance of themselves. This can be very distracting. What do you think?

Case 75: Dick Gregory Marches to Mayor Daley's Home

Dick Gregory and a group of about 85 followers had become dissatisfied with the Superintendent of Schools in Chicago because he had not moved speedily enough to desegregate the public schools. Believing that Mayor Daley had the power to remove the Superintendent, the group decided to march from City Hall to the Mayor's home, a distance of about five miles. A police lieutenant, four police sergeants, about forty policemen, an assistant city counsel, and the marchers' attorney accompanied the group.

When the demonstrators began marching around the Mayor's home, a crowd of more than 1,000 of the Mayor's sympathizers appeared. As was to be expected, the language became rough and threatening. Threats and obscenities, as well as rocks and eggs, were hurled at the marchers.

When, in the judgment of the Commanding Officer, the situation became dangerous, he asked Gregory and his marchers to leave the area. When they refused, they were arrested and charged with violating Chicago's disorderly conduct ordinance, which provided:

> All persons who shall make . . . or assist in making any improper noise, riot, disturbance, breach of the peace within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons . . . shall be deemed guilty of disorderly conduct and upon conviction thereof, shall be severely fined not less than one dollar nor more than two hundred dollars for each offense.

Gregory and his group were convicted.

Were the arrest and conviction justified? Would it make any difference to you, if the charge were disobeying the order of a policeman? Explain.

Case 73: *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966)

The Court was badly split. A bare majority of five reversed the convictions, while the four dissenters were livid with rage.

Justice Fortas announced the judgment of the Court in an opinion in which Chief Justice Warren and Justice Douglas joined. The five black young men had been convicted for sitting in the library from 10 to 15 minutes. There was nothing in the breach of peace law which made this conduct unlawful. This, however, said Justice Fortas, is not the point of this case. What really is at issue here is a fundamental right.

> We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances . . . As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities . . .

In this case, the Louisiana statute was used deliberately to frustrate this right.

> . . . The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution . . .

It is unfortunate, says Justice Fortas, that the stage of this drama should have been a library. It is doubly unfortunate that the drama dealt with racism.

> It is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty. It is a sad commentary that this hallowed place in the Parish of East Feliciana bore the ugly stamp of racism. It is sad, too, that it was a public library which, reasonably enough in the circumstances, was the stage for a confrontation between those discriminated against and the representatives of the offending parishes. Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered. Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.

Justice Brennan concurred on the ground that the Louisiana statute was too broad and therefore, unconstitutional.

Justice White's concurring opinion concluded that, if the students had been white, they probably would not have been arrested. Since they were black, he concludes that the convictions deny them the Equal Protection of the Laws.

Justice Black's dissenting opinion was joined by Justices Clark, Harlan, and Stewart. The first point to observe, declares the opinion, is that a library is not a public street and not subject to the same regulations.

> A tiny parish branch library, staffed by two women, is not a department store . . . nor a bus terminal . . . nor a public thoroughfare as in *Edwards v. South Carolina* . . . Short of physical violence, petitioners could not have more completely upset the normal, quiet functioning of the Clinton branch of the Audubon Regional Library. The state courts below thought the disturbance created by petitioners constituted a violation of the statute. So far as the reversal here rests on a holding that the Louisiana statute was not violated, the Court simply substitutes its judgment for that of the Louisiana courts as to what conduct satisfies the requirements of that state statute . . .

Justice Black finds the majority ruling a new departure in constitutional law and a dangerous precedent.

> In this case this new constitutional principle means that even though these petitioners did not want to use the Louisiana public library for library purposes, they had a constitutional right nevertheless to stay there over the protest of the librarians who had lawful authority to keep the library orderly for the use of people who wanted to use its books, its magazines, and its papers. But the principle espoused also has a far broader meaning. It means that the Constitution, the First and the Fourteenth Amendments, requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage "sit-ins" or "stand-ups" to dramatize their particular views on particular issues . . . The States are thus paralyzed with reference to control of their libraries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools. Efforts to this effect have already been made all over the country . . .
>
> . . . I am deeply troubled with the fear that powerful private groups throughout the Nation will read the Court's action, as I do—that is, as granting them a license to invade the tranquillity and beauty of our libraries whenever they have quarrel with some state policy which may or may not exist. It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. "Demonstrations" have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going . . .

Case 75: *Dick Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969)

It was a unanimous decision. Chief Justice Warren delivered the opinion of the Court, declaring the convictions unlawful. He regarded the case as such a simple one that it warranted only a brief opinion. In a few well-chosen words, he declared:

> Petitioners' march, if peaceful and orderly, falls within the sphere of conduct protected by the First Amendment . . . There is no evidence in this record that petitioners' conduct was disorderly. Therefore . . . convictions so totally devoid of evidentiary support violate due process . . . However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer.

For Justices Black and Douglas, this issue warranted more detailed consideration because it involved a very important case. Justice Black's concurring opinion, in which Justice Douglas joined, focuses on the promises of the Constitution.

> [This case] in a way tests the ability of the United States to keep the promises its Constitution makes to the people of the Nation. Among those promises appearing in the Preamble of the Constitution are the statements that the people of the United States ordained this basic charter "in Order to . . . secure the blessings of Liberty to ourselves and our Posterity. . . ."

The First Amendment, continues Justice Black, fulfilled that promise in writing by guaranteeing the rights of free speech, press, peaceable assembly, and petition. Beginning with the 1954 *Brown v. Board of Education* desegregation ruling, these rights were put to the acid test when blacks sought to speed up desegregation through picketing and mass demonstrations. The anticipated reaction by those who favored the status quo was emotional and determined. The result was confrontation and the sparks flew upward to the Supreme Court. Where should the Court draw the line between lawful and unlawful assembly and petition?

Justice Black recognizes that cities have the power to pass ordinances regulating demonstrations, but such laws must be narrowly drawn so as to protect First Amendment freedoms. In his judgment, the Chicago ordinance "might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment." What, he asks, for example, is the meaning of "improper," "unlawful purposes," "annoyance or disturbance."

The testimony showed that Gregory and his group "in the face of jeers, insults, and assaults with rocks and eggs . . . maintained a decorum that speaks well for their determination simply to tell their side of their grievances and complaints." Nevertheless, the jury in the case was told to ignore acts of violence committed by the crowd of onlookers and attempts made by police to arrest troublemakers. Since it may very well be that the jury convicted the accused by a literal reading of the ordinance, the conviction was an unconstitutional violation of First Amendment freedoms.

A narrowly drawn statute specifying clearly the types of conduct which are forbidden is permissible. The Chicago law does not fall within this permissible category.

5. Mock Trials and Appeals: The Tinker Case

Juvenile Justice, Institute for Political and Legal Education, 1978

This 193-page curriculum is designed to provide both teachers and students with information on school law and the juvenile court system, and to help them realize that constructive change and equal justice are possible "through the system" if citizens act responsibly. The curriculum features a wide range of teaching methods and materials and focuses on the federal and state court systems for adults and juveniles. It has been used nationally for over six years, was revised in 1978, and can be obtained from the Institute for Political and Legal Education, 207 Delsea Drive, RD #4, Box 209, Sewell, N.J. 08080, (609) 228-6000.

The following excerpt is from Section III—Youth in School, and illustrates how the Cases for Students in Part II can be adapted for mock trials.

HOW MUCH FREEDOM OF EXPRESSION DO YOU HAVE *INSIDE* THE SCHOOLHOUSE DOOR?

***Tinker v. Des Moines School District*, 393 U.S. 503 (1969)**

Wherein the First Amendment rights of children and of teachers are held *not* to be "shed at the schoolhouse door" but are to be protected unless their expression is the cause of substantial disruption.

Facts

John F. Tinker, 15 years old, and Christopher Eckhardt, 16 years old, were high-school students in Des Moines, Iowa. Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New York's Eve. John, Mary, Christopher, and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it and if he refused would be suspended until he returned without the armband. The students were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period of wearing armbands had expired—that is, until after New Year's Day.

Charging that their First Amendment right to freedom of expression had been abridged, the students sought an injunction in District Court prohibiting their school board from carrying out the suspensions. A hearing was held to determine whether there was sufficient evidence to warrant such an injunction. Students in the school had been permitted to wear ordinary political buttons and even an Iron Cross (a traditional emblem of Nazism), so the Tinker's lawyers argued that the school was restricting the free expression of a particular point of view, *i.e.*, opposition to the Vietnam War.

The District Court upheld the position of the school authorities on the grounds that the armbands might have tended to "create a disturbance" in the school. An Appellate Court supported the District Court decision, and then the Supreme Court agreed to hear the case on final appeal.

ACTIVITY: *Tinker v. Des Moines*, A Mock Trial*

(NOTE: If the activity outlined below is used in class, it should precede any discussion of the actual Supreme Court opinion which has been included at the end of the Tinker simulation.)

The following simulation is designed to acquaint students with the functioning of the Federal court system and to have them experience first-hand involvement with the issues of symbolic expression dealt with in the *Tinker* case. Full directions and role assignments are as follows:

Assignment I: Designation of Roles

Role descriptions begin on page 35).

- One or two lawyers for Tinker
- One or two lawyers for School Board
- John F. Tinker
- Christopher Eckhardt
- Mary Beth Tinker
- Dennis Pointer
- Aaron McBride
- Andrew Burgess
- Leonard Carr
- Leonard Tinker
- Court Officer
- Chief Justice Earl Warren
- Justice Hugo Black
- Justice William O. Douglas
- Justice John M. Harlan
- Justice William Brennan
- Justice Potter Stewart
- Justice Byron White
- Justice Abe Fortas
- Justice Thurgood Marshall

The teacher should assume the role of District Court Judge Stephenson and render the decision 258 F. Supp. 971 (1966). He/she may wish to locate this decision in the law library and copy it to hand out to students as the basis for appeal.

Roles should be assigned to students one week in advance of the beginning of the simulation. Allow sufficient time for them to research their roles and at least one day of small group discussions to alleviate any problems.

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*The simulation is adopted from one developed for the Institute for Political and Legal Education by Edward T. Munley of Phillipsburg (New Jersey) High School, a teacher-coordinator in the IPLE program.

Assignment II: Conferences

The lawyers, during the first two days, and the Justices, thereafter, have the most difficult roles. It will be beneficial if the time can be allotted to review with each of these individuals their perception of the way in which they should portray their roles.

The students who will be witnesses should meet with their respective lawyers to discuss what information each will contribute at the hearing. (If an attorney is available, he could best be used on this day.)

Assignment III: Evidentiary Hearing —
United States District Court for the Southern District of Iowa, Central Division

Judge Stephenson presiding.

The lawyers' instructions contain all the information necessary for the trial. See Role Descriptions 1 and 2.

The teacher should allow the lawyers representing Tinker to present their witnesses first. The lawyers for the school board may then cross-examine the Tinker witnesses. The Tinker lawyers may, of course, cross-examine any witnesses presented by the school board.

Assignment IV: Oral Argument Before the Supreme Court

Before the Supreme Court the lawyers may present no witnesses but must present a concise legal argument grounded on available legal precedent and the lawyer's knowledge of what might appeal to at least five justices. Although the facts of the case are obviously material, they have already been determined at the trial level. Appellate courts decide points of law; they do not determine the facts.

The objective before the Supreme Court is to build a minimum winning coalition of five justices.

During the oral argument, either the Chief Justice or any of the associate justices may, at any time, interrupt the lawyers for the purpose of clarification of any point being offered.

Assignment V: In Camera or Conference Session of the Supreme Court

In the conference session (held *in camera*, that is in the justices' chambers) each justice first gives his opinion of (1) what are the relevant facts of the case, (2) what are the issues involved in the case, (3) how the conflict should be resolved (should the injunction be granted), and (4) what reasoning should be contained in the opinion.

The justices give their view of the case by order of seniority (the Chief Justice is always considered the most senior justice).

The order of seniority in this case is as follows:

1. Chief Justice Earl Warren
2. Justice Hugo Black (appointed to the bench in 1937)
3. Justice William O. Douglas (1939)
4. Justice John M. Harlan (1955)
5. Justice William J. Brennan, Jr. (1956)
6. Justice Potter Stewart (1958)
7. Justice Byron R. White (1962)
8. Justice Abe Fortas (1965)
9. Justice Thurgood Marshall (1967)

After the justices give their interpretation of the way in which the case should be decided, the Chief Justice decides the issues which will be voted upon.

Votes which might be taken, for example:

1. Should the injunction be granted?
2. Should the case be decided on First Amendment grounds?
3. Should a "test" for this type of situation be constructed?

When voting, the justices vote by reverse seniority, from the most junior justice to the Chief Justice.

The *in camera* discussion should be conducted using the "fish bowl" technique, with other participants in the simulation having a chance to observe without joining in and then evaluate the proceedings.

Assignment VI: "Debriefing" the Tinker Case

After a decision has been rendered by the Supreme Court, the debriefing process can begin. It is important that sufficient time be allocated for it. One class period would certainly not be excessive. Discussion should center on the effectiveness of the arguments for each side, on the realism with which the roles were played, and finally on an evaluation of the outcome of the actual *Tinker* case through examination of the excerpted decision.

DISTRICT COURT

Judge Witness Chair
Court Officer
Tinkers & Counsel Counsel for School Board
Witnesses

ORAL ARGUMENT

Marshall, White, Brennan, Douglas, WARREN, Black, Harlan, Stewart, Fortas
Counsel for Tinkers Counsel for School Board

"IN CAMERA" SESSION

Warren
Marshall Douglas
Harlan Fortas
Brennan Black
Stewart White

Role 1: Lawyer(s) for Tinkers

This role may be shared by more than one participant.

Your purpose is to convince the District Court judge that he should grant an injunction that will restrain the authorities of the Des Moines Independent Community School District from disciplining your clients.

During the evidentiary hearing (similar to a trial court proceeding), you must not only cite the relevant law but also establish "the facts" of the case.

In citing the law, the following cases may be helpful: *Gitlow v. New York*, 268 U.S. 652, (1925) wherein it was determined by the Supreme Court that an individual's right of free speech is protected against state infringement by the due process clause of the Fourteenth Amendment; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, (1943) the school flag salute case cited earlier; *Stromberg v. People of State of California*, 283 U.S. 359, (1931) wherein it was established by the Supreme Court that the wearing of an armband for the purpose of expressing certain views is a symbolic act and falls within the protection of the First Amendment's free speech clause.

In particular, you are seeking an injunction under 42 U.S.C. § 1983 which permits a person whose civil rights have been abridged in violation of the Fourteenth Amendment to sue for redress.

Since the facts of the case may be as important as the law, you must use those witnesses, and only those who are most likely to establish the facts you would like on the record. You, therefore, would want to call John, Mary Beth, and possibly Leonard Tinker (father), and Chris Eckhardt. You might also consider Chris' father, William, and John's American History teacher, Aaron McBride (fictional character).

In calling these witnesses, you need to stress the fact that your clients acted out of deeply felt convictions and by no means did they wish to display contempt for school authority or did they wish to cause a disturbance.

During your period of cross-examination of the defendants' witnesses, your purpose is to show that the school authorities singled out a particular type of speech concerning a particular topic (the Vietnam War) to prohibit. Your chief concern is to show that the regulation was unreasonable, or could not reasonably be defended as being necessary to the functioning of the school system.

Other cases you may rely upon are *Burnside v. Byars*, 365 F2nd 744 (5th Cir., 1966) and *Blackwell v. Issaquena County Board of Education*, 363 F2nd 749 (5th Cir., 1966), wherein it was held that a school regulation prohibiting the wearing of "freedom buttons" was not reasonable. The Court stated that school officials ". . . cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars, supra.*

Role 2: Attorney(s) for School District

Your purpose is to convince the District Court Judge that he should deny the plantiff's request for an injunction.

At the evidentiary hearing (similar to a trial court proceeding), you must not only cite the relevant law but also establish "the facts" of the case.

In citing the law, the following cases may be helpful: *Dennis v. United States*, 341 U.S. 494, (1951); *Near v. State of Minnesota*, 283 U.S. 697, (1931); *Pocket Books, Inc. v. Walsh*, 204 F. Supp. 297 (D. Conn. 1962), wherein it was established that the protections of the free speech clause are not absolute and *United States v. Dennis*, 183 F. 2d 201, 212 (2d Cir. 1950), wherein it was asserted that "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Since "the facts" of the case may be as important as the laws cited, you must make every effort to insure that the record displays those facts which you wish to have on the record. In light of this, you would want to call Dennis Pointer (Mary Beth's math teacher), Andrew Burgess (the high school principal), Leonard Carr (the school board president), and perhaps others.

Your prime concern on examination of your witnesses is to display the fact that "there was reason to expect that the protest would result in a disturbance of the scholarly, disciplined atmosphere within the classroom and halls of your schools."

On cross-examination of the plaintiffs, your purpose is only to ascertain if they were aware of the regulation.

Role 3: John F. Tinker

You, your parents, and your friends have been against the American involvement in the Vietman War from the beginning. You feel that there is no justification for American participation in a foreign "civil war."

You have participated in anti-war protests in the past and, along with your parents and friends, you decided to wear a black armband to school to display your support for the continuation of the Christmas truce and your grief for those who have died in Vietnam.

Mary Beth and Chris wore their armbands on Monday, but you were a little hesitant. However, after Mary Beth and Chris were suspended, you decided to wear your armband on Tuesday. You felt self-conscious because of the stares your armband drew, but you felt determined that it was your right to express your views in this way. After third period, you were called to the principal's office. Upon your refusal to take off the armband, you were suspended.

Role 4: Christopher Eckhardt

A plaintiff, age fifteen, who attended Roosevelt High School.

You wore an armband on Monday, the first day of the demonstrations. You are, perhaps, more than the Tinkers, vocal about your opposition to the war. (See role for #3, John F. Tinker.)

Role 5: Mary Beth Tinker

A plaintiff, age thirteen, who attended Warren Harding Junior High School. (See role for #3, John F. Tinker, and #4, Chris Eckhardt.)

Role 6: Leonard Tinker

You are the father of John and Mary Beth Tinker and completely support their feelings in regard to the Vietnam

War. (See role sheet #3, John F. Tinker; and #5, Mary Beth Tinker.) For further reference, see Justice Black's dissent.

Role 7: William Eckhardt

You are the father of Chris Eckhardt and completely support his feelings in regard to the Vietnam War.

You and your wife gave Chris the idea to wear the black armband. After the school authorities declared the wearing of armbands illegal, you were the first to see the possibilities for a test case on "free speech" grounds. (See also the roles for #3, John F. Tinker and #4, Chris Eckhardt.)

Role 8: Dennis Pointer

You are Mary Beth Tinker's math teacher. Mary Beth entered your room on the Monday of the demonstration wearing her armband. The armband caused a discussion of the War; it lasted all period and completely disrupted your class.

Role 9: Aaron McBride

You are John Tinker's history teacher. The wearing of the armbands caused no disruption in your class, and you believe that this form of symbolic protest is akin to "pure speech" and as such is protected by the First Amendment.

John is one of your best and most hard-working students; you believe the school board should never have prohibited the armbands.

Role 10: Andrew Burgess

You are the principal of North High School. You heard about the upcoming armband demonstration and called an administration meeting to head off the problem. The administrators, fearing a disruption of the school program, decided to ban the wearing of armbands.

Role 11: Leonard Carr

You are the president of the Des Moines school board. You support the decision of the school administrators because the community is deeply divided on the war and you fear any disturbance will lead to a major conflict.

NOTE: Students assigned the roles of the Supreme Court Justices may wish to do further research. A great deal of material on each justice should be available at any library.

Role 12: Hugo Black

Justice Black is a "New Deal" Democrat and is sometimes termed a populist.

Black was very much a part of the constitutional revolution of the Warren Court, but to brand Black as a liberal and associate him with Justices Douglas or Brennan would be to oversimplify the case and lead to error in interpretation.

Justice Black fought for his entire judicial career for "incorporation" (making the Bill of Rights applicable to the states through the "due process" clause of the Fourteenth Amendment). This struggle often led to his agreement with the liberals. For example, in the censorship cases, Douglas and Black took the same absolutist position that the First Amendment allows no censorship *at all.*

The justice from Alabama departs from the positions usually taken by the liberal bloc when questions of equality are reviewed by the Court. The equality category of cases commonly includes poverty law, indigents, and protest demonstrations.

"Black was a self-styled strict constructionist. In discussing the Constitution he explained: 'I believe the Court has no power to add or subtract from the procedures set forth by the founders...I shall not at any time surrender my belief that the document itself should be our guide, not our own concept of what is fair, decent, and right.' "*

Role 13: Byron White

Byron R. White is the first native of Colorado to become a justice. When he was first named to the Court in 1962 by President Kennedy, a long-time friend, his accomplishments were considerable: Phi Beta Kappa, Rhodes Scholar, All-American football starr, professional football player, member of the Football Hall of Fame, decorated naval officer, lawyer, major assistant in a presidential election campaign and deputy attorney general. On the Court, he has aligned himself with the conservative element to the surprise of many who believed he would vote consistently with the liberal bloc.

The son of the mayor of Wellington, a small town in Colorado, Justice White achieved an outstanding academic and athletic record at the University of Colorado and was named an All-American halfback. To earn money for his law training, he played for the Pittsburgh Pirates (now Steelers) in 1938 and was the leading ground gainer in the National Football League. Then followed a period at Oxford University as a Rhodes Scholar, interrupted by the beginning of World War II. Justice White entered Yale Law School, and played in 1940 and 1941 for the Detroit Lions at the same time. He served in the Navy in the Pacific, where he renewed his acquaintance with John F. Kennedy, whom he had met in England. Completing law school after the war, he was law clerk to the late Chief Justice Vinson and then established a practice in Denver, Colorado, eventually handling considerable corporation work. He took little part in politics until 1960, when he went to work with the Kennedy forces, and was credited with delivering 27 of Colorado's 42 convention votes for Kennedy. He then ran the Citizens for Kennedy organization during the 1960 campaign, and after the election was appointed deputy attorney general.

Role 14: John Marshall Harlan

Born in Chicago in 1899, Harlan was the grandson and namesake of a Supreme Court Justice. He graduated from Princeton in 1920, Oxford in 1923, and New York Law School in 1924. He was admitted to the bar in 1925, practiced law in New York City, and was appointed to the Supreme Court by President Eisenhower in 1954.

Although his dissents from the decisions of the activist Warren Court won him a reputation as a conservative, he may more accurately be described as a firm believer in the strictly judicial nature of the Court's function. He considered it his duty to decide each case according to the law, as the law had been determined.

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*From a short biography of Justice Black in *The Supreme Court and Its Great Justices,* by Sidney H. Asch, Arco Publishing Co., Inc., New York, 1971.

Role 15: Chief Justice Earl Warren

The years that Earl Warren presided on the Supreme Court were years of legal revolution. The Warren Court set a new path in race relations *(Brown v. Board of Education of Topeka, Kansas)*, discrediting the legal basis for discrimination and, as it happened, helping to release long-suppressed emotional results of racism. It wrote practically a whole new constitutional code of criminal justice, one restraining the whole process of law enforcement from investigation through arrest and trial, and applied the code rigorously to state and local activities formerly outside of federal standards. It greatly restricted governmental authority to penalize the individual because of his beliefs or associations.

Warren favored most of the major changes in constitutional doctrine undertaken by the Court. As a statesman, Warren had a sense of history, an understanding of people and firmness of character. He was open, optimistic, and idealistic without ideology. He saw good in other human beings and he was decisive.

Earl Warren achieved his greatest fame as Chief Justice of the Supreme Court but Warren began his career as a California politician. Prior to his appointment by President Eisenhower to the Court, Warren served as Governor of California.

Role 16: Thurgood Marshall

Thurgood Marshall, in 1967, became the first black ever named to the Court. Justice Marshall is part of the "activist" and "liberal" section of the Court. He will tend to favor individuals against the state or the wak against the strong.

The son of a Pullman car steward and great-grandson of a slave, Marshall has made a career out of causes but seldom has been a controversial man personally He has the reputation of being the man who led the Negro civil rights revolution to its first and often its biggest victories in the courts. His most notable victory came in the Supreme Court's 1954 decision, *Brown v. Board of Education*, which outlawed racial segregation in the schools. Assessing his successes, one friend said Marshall's chief asset was "his ability to take very sticky situations and patch them over with his personality." A long-time white associate said perhaps Marshall's most "obvious characteristic" was his capacity "to put you at ease on the matter of race." He has been likened to former Chief Justice Warren in his views, reportedly sharing the conviction that difference of opinion can be negotiated and being more interested in the background of a case than in its purely technical side. In 25 years as counsel for the National Association for the Advancement of Colored People and the NAACP Legal Defense and Educational Fund. Marshall argued 332 cases before the court, emerging the winner 29 times.

Role 17: Abe Fortas

Justice Fortas had a broad legal knowledge, sound judgment, and a liberal philosophy. It is not uncommon for Supreme Court Justices to change the character of their legal opinions after their appointment to the bench. Fortas' performance, however, has been entirely consistent with the reputation he had established as a private lawyer. He championed the civil rights of the small and often obscure individual as well as defending corporate giants such as Coca Cola Company. He aroused national interest when he defended a number of individuals termed as "security risks."

Role 18: Potter Stewart

Potter Stewart was the fifth and last justice named by President Eisenhower. As did Justice Brennan (in 1957), he joined the Court during its stormy years after the landmark school desegregation case in 1954.

The conservative group in 1958 consisted of Justices Frankfurter, Clark, Harlan, and Whittaker. The liberal group consisted of Chief Justice Warren and Justices Black, Douglas, and Brennan.

The basic difference between these groups was thought to relate primarily to the Justices' differing views as to the appropriate use of the Court's power to hold unconstitutional actions of other branches of the government. The "liberals" saw the Court as a guardian of the individual liberties protected by the Bill of Rights. They tend to interpret the Bill of Rights in a broad fashion.

The conservatives adopted a narrow view of the Bill of Rights and, in a situation wherein a choice was necessary between individual liberty and the power of the state, the conservatives tend to support the power of the state.

Justice Stewart soon became known for independence of mind and, when the court divides evenly, he often casts the deciding vote. He generally leans toward a liberal position.

Role 19: William J. Brennan, Jr.

William J. Brennan, Jr., is one of eight children of an Irish immigrant couple who came to the United States in 1890. A significant influence in the choice of Justice Brennan's career was his father, who worked in the establishment of labor unions in the city of Trenton. When the opportunity arose, the elder Brennan ran for a council seat on the labor ticket. This involvement with the labor movement had the effect of interesting the young lawyer in labor law, an interest which would much affect his career.

Perhaps a speech of the Justice can best sum up his feelings in regard to the job of the court: "The constant for Americans, for our ancestors, for ourselves, and we hope for future generations is our commitment to the constitutional ideal of liberty protected by the law . . . It will remain the business of judges to protect the fundamental constitutional rights which will be threatened in ways not possibly envisaged by the Framers . . . the role of the Supreme Court will be the same . . . as the guardians of (constitutional) rights."

Role 20: William O. Douglas

William O. Douglas is the foremost conservationist, naturalist, and traveler in the history of the Supreme Court. He has written more books, mainly on conservation and travel, than any figure, judicial or otherwise, on the American scene. Douglas is the only individual justice whose picture is likely to appear, as it has, in *Field and Stream* magazine singing "The Song of Sergeant Parker."

Douglas served on the Court longer than any justice in the Court's history. He was appointed to the Supreme Court by F.D.R. in 1939, when he was forty-one, and he has been its foremost exponent of individual liberty, and particularly of freedom of speech.

William O. Douglas is probably best known for his advocacy of freedom of speech. In addition, he can often make his point with just one sentence. An example of this power are his works in regard to a case in which a doctor was excluded from the practice of his profession in New York: "When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us."

Excerpts from the Decision of the Supreme Court in *Tinker v. Des Moines**

NOTE: These opinions should only be referred to or distributed to the students once the preceeding simulation game has been played and those playing the parts of the Supreme Court justices have rendered their opinions. As part of the "debriefing" these can be introduced for purposes of further clarification of the issues involved in the case.

From the Majority Opinion:

Noting that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court per Fortas, J., reversed: "The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment . . ."

"It does not concern agressive (sic), disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.' "

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students."

"Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the school or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises."

"In our system, undifferentiated fear or apprehension of disturbance (the District Court's basis for sustaining the school authories' action) is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any works (sic) spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk . . ."

"It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam— was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible."

"If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student or opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."

"In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guaranties."

Justices Stewart and White submitted brief concurrences.

From the Dissenting Opinions:

In the course of a lengthy dissent, in which he scored the "myth" that "any person has a constitutional right to say what he pleases, where he pleases, and when he pleases," Justice Black observed: "While the absence of obscene or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw it would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War.

"Even if the record were silent as to protests against the Vietnam War distracting students from their assigned classwork, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam War have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands."

In a separate dissent, Justice Harlan maintained that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions" and thus "would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." In the instant case, he found "nothing which impugns the good faith of respondents in promulgating the armband regulation."

Questions for further consideration in class discussion:

1. What if many students, rather than only a handful, had made hostile comments to the students wearing armbands?
2. What if the wearing of armbands had led to violence on school grounds?

Should either of the above situations have any bearing on the outcome of the Court decision?

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*From Lockhart, William, et al., *The American Constitution*, St. Paul, Minnesota, West Publishing Company, 1970, pp. 531-32.

6. Students and the Bill of Rights: Priorities, Limits, and Responsibilities

from *Responsibilities and Rights in the Schools*, 1978, by Donald P. Vetter and Linda Ford of the Carroll County Public Schools, Westminster, Maryland 21157.

This unit was designed to help students (1) become more aware of their rights as citizens of the United States and their school communities, and (2) realize that their rights (like those of all citizens) are limited and that each right carries a corresponding responsibility. It also was designed to create "a better understanding and working relationship among administrators, parents, teachers, and students." The 50-page unit has been used as part of the curriculum in junior high schools and high schools throughout the state of Maryland. It includes 10 topics and an evaluation plus variations for high and low ability students. It can be ordered from Law-Related Education Program for the Schools of Maryland, 5401 Wilkens Avenue, Baltimore, Md. 21228, (301) 455-3239.

The following excerpts include the Teacher Overview and two of the topics—The Bill of Rights and Limitations on Student Rights.

1. WHAT IS THE BILL OF RIGHTS?

Topic: Introduction to the Bill of Rights

Purpose: These activities have been designed to introduce the student to the Bill of Rights and the specific freedoms provided therein.

Part I: STHGIR

Procedure:

(1) Distribute "Visitor from Outer Space" (p. 178).

(2) Have students complete the handout and then tabulate their responses in one of the following ways:
  (a) What are the rights you designated as most important? Why?
  (b) What are the rights you were willing to give up? Why?

(3) Conduct an in-depth discussion of the reasons for their ranking.
  (a) At the end of the discussion, praise pupils who fought to keep their rights and expressed their displeasure at giving them up to aliens or humans.
  (b) Highlight the possible effects of "authority" on the willingness of various persons to give up their Constitutional rights.
  (c) Make a point of telling students that many Americans have fought and died to maintain these rights.
  (d) You may wish to draw an analogy to the Nazi Germany situation and bring in the concept of the underground resistance movement.

Part II

Procedure:

(1) Hand out copies of "This is Freedom" (p. 179). Read over directions with students. Allow time for student to complete activity. (Note: this resource sheet is a list of parts of the Bill of Rights written in easier terms. Some have been omitted.)

(2) Debrief by allowing students to openly express their opinions and justify their positions. For those items that students disagree with, ask them to restate the item so it expresses their opinion.

(3) Inform students that all of these freedoms are provisions of the Bill of Rights of the Constitution of the U.S. (Be sure to tell students that some of the items on their ditto have been omitted.)

(4) Prepare a short lecture (10 to 15 minutes) to introduce the Bill of Rights. Teacher should decide which points need to be emphasized. Suggestions are given below.
  a. Background
  b. Structure (*i.e.*, part of Constitution, first 10 amendments)
  c. Subject to interpretation (*i.e.*, Supreme Court)
  d. Application to modern society.
  e. Specific application to students.

(5) Hand out copies of the Bill of Rights. This may be found in *Practical Politics and Government in the United States*, pp. 56-561. You may wish to inform students that the 14th Amendment is sometimes considered a part of the Bill of Rights. This can be found on p. 562. Also, most Civics and U.S. History texts have a copy of the Constitution.

(6) Ask Students to read the Bill of Rights of the United States Constitution, and complete the chart on p. 180. You may wish to divide students into groups for this activity. You may also wish to give each group only a certain number of amendments. (Ex: Group 1, amendments 1-3) to expedite the process.

(7) Debrief by allowing students to state their responses in class. Teacher should list the freedoms on board.

(8) Give each group one of the specific freedoms they have listed on board. Have them construct a skit which will illustrate that freedom. Allow students to perform skits before the class. (Note: Teacher should *not* at this point comment on the legality of their illustration. Interpretation and limitations will be covered later.)

Materials:

1. Student Resources (pp. 178 and 179), "A Visitor From Outer Space," "This is Freedom," and chart on p. 180.
2. Practical Politics and Government

2. ARE MY RIGHTS AS A STUDENT UNLIMITED AND GUARANTEED WITHOUT PERSONAL RESPONSIBILITY?

Topic: Limitations on Student Rights: The Relationship Between Right and Responsibility

Purpose: This lesson has been designed to help students realize that all rights are limited and for each right they have a personal responsibility which must be fulfilled in conjunction with it.

Procedure:

(1) Reproduce and distribute copies of p. 181 and conduct a class discussion based on the questions listed.

(2) Ask students to list what they consider to be four *general* freedoms or rights which are a continuing theme throughout their handbook. Emphasize the fact that you are looking for general freedoms (dress, speech) and not specific freedoms (freedom to buy a Coke after school).

(3) Allow time for students to complete the activity. Ask several students to read their lists aloud and write their answers on the board.

(4) Pose questions: Are these freedoms *absolute* or *unlimited freedoms? (You may have to give an example before students will understand what you are looking for.) Suggested example: It is obvious that, as a student, you have freedom of speech just as an adult does. However, this is not* total or unlimited freedom of speech. You have the right to talk while eating lunch in the cafeteria, but you do not have the right to create a panic by running through the cafeteria and falsely screaming, "Fire". This is one limitation on your freedom of speech in school. You have the right to express your opinion in class, but you do not have the right to shout obscenities at your teachers or other students because you do not agree with their opinion. This is another limitation on your freedom of speech within the school.

(5) Ask students to re-read the list which was compiled on the board and then to write a limitation for each of the freedoms listed.

(6) Ask volunteers to read their responses and record their limitations on the board.

(7) Post Question: For each freedom you have, there is a responsibilities (sic) that goes with it. What are the responsibilities you must fulfill in order to enjoy the freedoms we have listed on the board?

Suggested Example:
Freedom: Freedom of Speech
Limitation:
Can't shout "fire" in cafeteria.
Can't shout obscenities in class.
Responsibility: To see that you do not get involved in the limitations listed above and to do your best to prevent someone else from committing them. It is also your responsibility to report them to the authorities, if necessary.

(8) Allow time for students to complete activity. Ask volunteers to read answers and record them on the board.

(9) Summarize by asking students to make generalizations about the nature of freedom. (What can you tell me about the characteristics of freedom after today's lesson?)

Suggested Response:

a. Freedom is not total or absolute
b. All freedoms are limited.
c. With each freedom comes a responsibility which is my duty to fulfill.

Variation

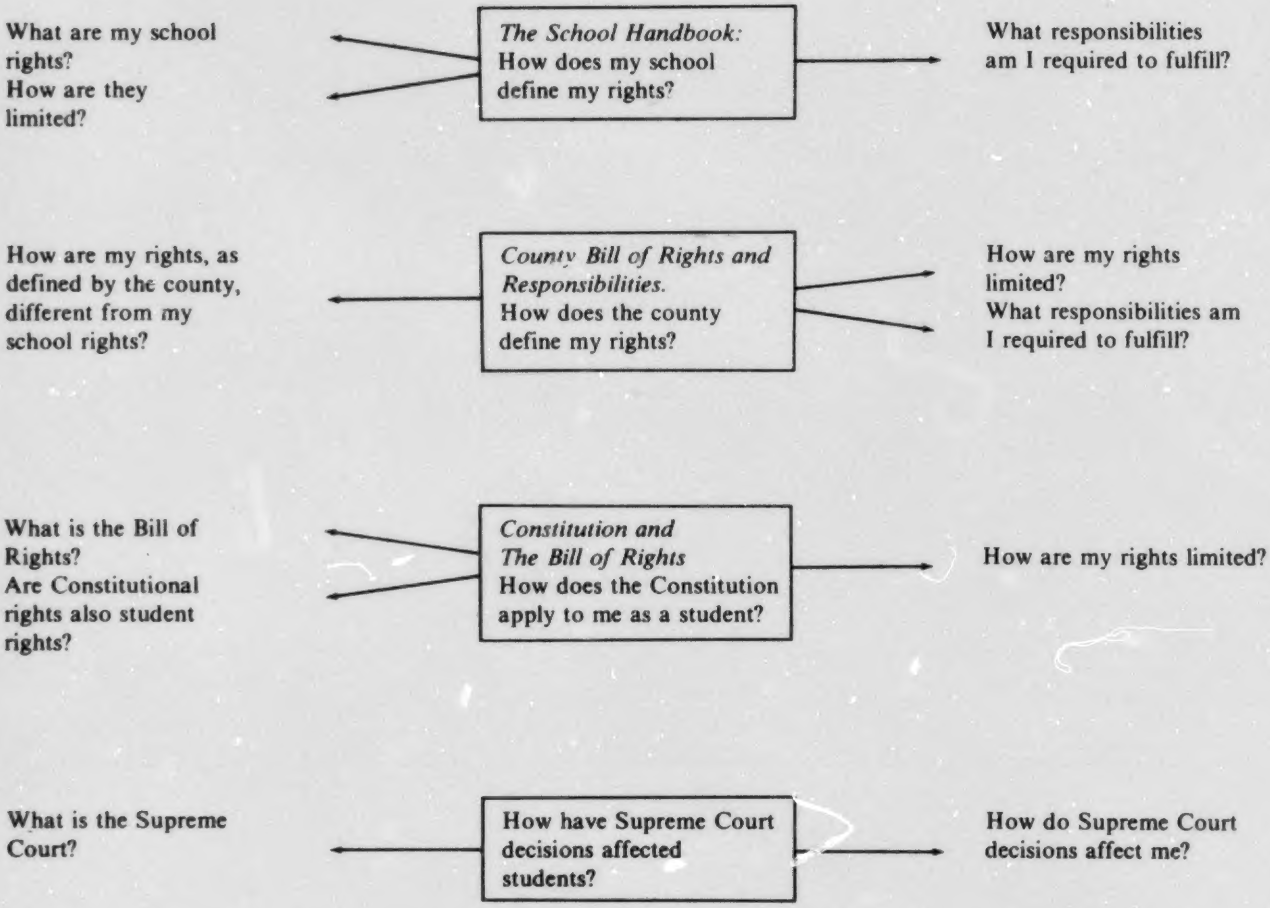
Low Ability:

Make a transparency of p. 182. Ask students to explain what the cartoon means. Using their responses, introduce the idea of limitations on freedom. Pose Question: What kinds of things might the school *not* allow you to print in school newspaper? Reinforce the idea of limitations. Pose Question: If you knew someone was going to print something in the school newspaper that would cause a problem, what should you do? Introduce the idea of responsibility in conjunction with freedoms. Culminate the activity by asking students to pick one freedom from the student handbook and draw a cartoon which could illustrate that freedom's limitation.

Materials:

(1) Student Handbook from your school
(2) Student Resource pp. 181 and 182.

TEACHER OVER-VIEW OF
EXPERIENCE I:
RESPONSIBILITIES AND RIGHTS IN SCHOOLS



What are my school rights?
How are they limited?

The School Handbook:
How does my school define my rights?

What responsibilities am I required to fulfill?

How are my rights, as defined by the county, different from my school rights?

County Bill of Rights and Responsibilities.
How does the county define my rights?

How are my rights limited?
What responsibilities am I required to fulfill?

What is the Bill of Rights?
Are Constitutional rights also student rights?

Constitution and The Bill of Rights
How does the Constitution apply to me as a student?

How are my rights limited?

What is the Supreme Court?

How have Supreme Court decisions affected students?

How do Supreme Court decisions affect me?

A VISITOR FROM OUTER SPACE

It is the year 1993, and you are living a quiet, prosperous life here in Maryland. You are quietly watching television with your family when a special news bulletin comes over the TV station. You immediately see that this is not the normal type of news bulletin because there is what looks like a very strange creature on the screen—the only thing which is familiar is that he is speaking in English. He tells you that he and his people have gained control over all of the communications networks in the United States and that everyone had better pay attention to what he has to say. You change the channel—and just as he said—there he is on every station. He begins to speak very loudly, and you gather your family around because you are beginning to worry about what he is going to do. His speech is as follows:

> "My name is STHGIR and I am from the planet NOITUTITSNOC in another galaxy where the inhabitants are far superior to the beings on this planet EARTH. Just as we have gained control over the communications of the United States, we have the ability to take complete control over every one of your lives. We do not want a war between our planet and yours, but we do want to control some things so that we can live in peace and harmony with you. We have looked at some of your laws and the way your government operates and have found it to give too much freedom to the individual. Therefore, we are going to conduct a survey to try and arrive at a decision in which both you and I are happy. As I have said, I do not want to take everything away from you—but I can't allow you to continue to live as you have in the past. Therefore, I am giving you a list of ten of the rights which you now have according to your Constitution. You are to look over the list and decide which of the ten are most important to you. I will allow you to keep FIVE of the ten rights, the five which get the most votes from all the citizens of the United States. You are to rank the following rights in the order in which you would give them up, with 1 being the one you would give up last and 10 being the one you would give up first. After you have completed your ranking, you will receive further instructions."

________ Right to bear arms
________ Right of freedom of speech
________ Right to legal counsel
________ Right to protection from cruel and unusual punishment
________ Right to freedom of press
________ Right to a jury trial
________ Right to freedom of religion
________ Right to peacefully assemble
________ Right protecting self-incrimination
________ Right to privacy

THIS IS FREEDOM?

Directions:

Below you will find a list of generalizations concerning a number of rights or freedoms. Place an *A* in the front of the statement if you agree with it and a *D* in front of the statement if you disagree with it. Be sure you can justify your position.

1. ________ Picketing in front of a factory or corporation by it's (sic) workers should be out-lawed.

2. ________ Anyone who is not Christian should be forced to leave this country.

3. ________ Newspapers should be allowed to print anything they wish.

4. ________ No one should be allowed to openly criticize the government.

5. ________ If the police believe you are guilty of a crime, they should be allowed to search you and/or your home and belongings.

6. ________ If you are arrested, you should be informed of the crime.

7. ________ Everyone is entitled to a fair and speedy trial.

8. ________ When on trial, you should be able to hear the witnesses who testify against you.

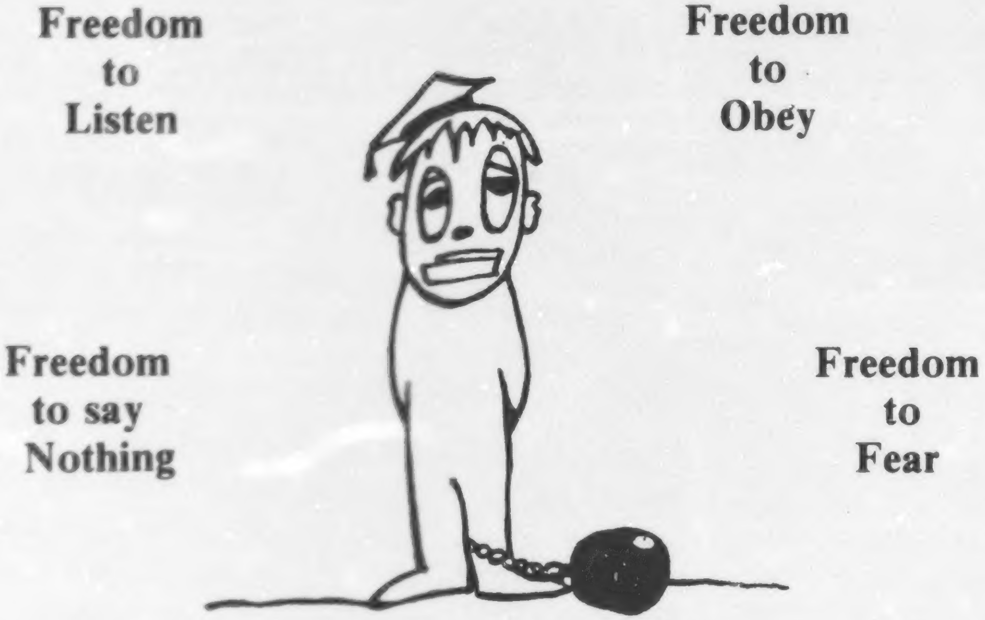
THE BILL OF RIGHTS

Directions:

Just as you discovered that your handbook guaranteed certain rights to you as a student, you will find that the Bill of Rights provides specific rights for you as a citizen. Using the guidelines below, list the specific freedoms which are given to you in the Bill of Rights. Since this document was written a long time ago, you may have difficulty understanding some of the amendments. If this happens, ask your teacher for help.

AMENDMENT	FREEDOMS
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	
13.	
14.	

"The Four Student Freedoms"


Freedom to Listen
Freedom to Obey
Freedom to say Nothing
Freedom to Fear

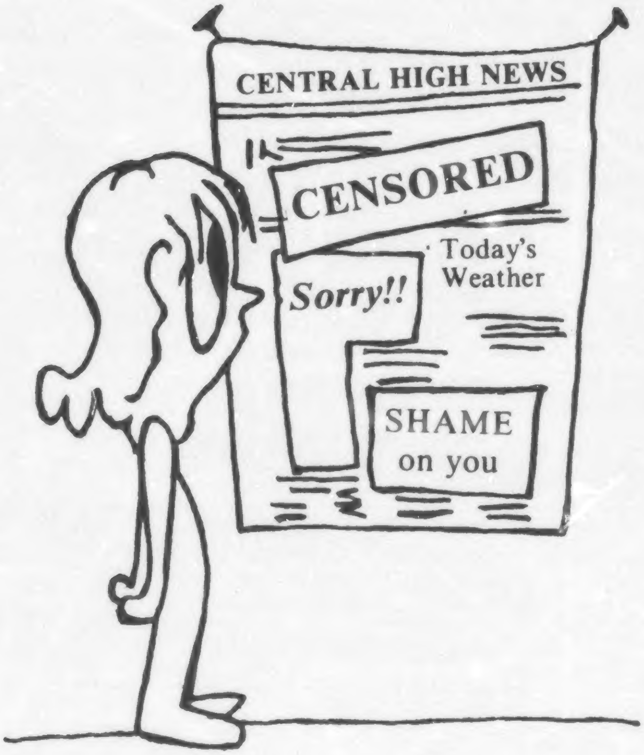
Source: Curan, Larry (Ed.): *Youth as a Minority: An Anatomy of Student Rights,* National Council for the Social Studies, 1972.

TEACHER RESOURCE

THE FOUR STUDENT FREEDOMS

1. Does the word "freedoms" mean the same thing as rights?
2. What is the cartoon saying to you?
3. Do you agree with the message? Why or why not?
4. How would you change the four student freedoms to make them more realistic?
5. What do you think was the author's purpose in making this cartoon?

"Whatever happened to freedom of speech?"


CENTRAL HIGH NEWS
CENSORED
Today's Weather
Sorry!!
SHAME on you

BEST COPY AVAILABLE

7. Due Process in the Public Schools

from *Students and the Law: Respecting the Rights of Others,* The New York State Bar Association and the New York State Education Department, 1979

This five-day curriculum unit examines both the scope and limits of important constitutional and statutory rights. In addition, it includes curricular objectives, a teacher's guide, a pretest, unit test, plus excerpts from relevant U.S. Supreme Court decisions, a glossary, and issues for advanced students. It assumes that if students understand how the law operates in their lives, "they are more likely to be responsible citizens of the school community, to respect the rights of others, and to support the legal system upon which their rights are based." This unit has been used in secondary schools throughout New York State and can be obtained from the New York State Bar Association, 1 Elk Street, Albany, N.Y. 12207, (518) 474-1460.

The following excerpt is from lesson 3 on Due Process.

DUE PROCESS

Introduction

The argument started in Union High School's teachers' lounge. Bill Johnson, a coach and teacher for 15 years, was angry about an 11th grade student who demanded that the principal hold a hearing before suspending him for fighting in class. "That student knew he started the fight," fumed Mr. Johnson, "and it's the second time this year. Just because his father is a lawyer, he's trying to show off and make more trouble." Johnson was fed up with the way students were demanding their rights and the way judges were insisting on due process. "Soon," Johnson predicted, "you won't even be able to suspend a student without first holding a trial. And the next thing you know, students will say they want to consult with a lawyer before talking to the principal about their misconduct."

"What's so bad about a student wanting a hearing before he's judged guilty?" asked Jim Steward, a 28-year-old social studies teacher. "Maybe we ought to teach students more about their rights in school. Maybe we should even make this part of the civics curriculum. After all, due process only means fair procedures."

"You're wrong," replied Johnson. "Students know plenty about *their* rights, but they don't seem to know or care about the rights of other people. The problem is that schools are too permissive and kids have too much freedom. Schools should teach more about responsibilities and less about rights. These days administrators are spending so much time worrying about the rights of kids who are making trouble that they don't have much time left for the good students who come to school to learn. And a lot of the rights you're talking about do more harm than good. Lawyers use rights as a way to keep guilty people out of jail. If you have your way, we'll have to turn our classrooms into courtrooms, and we'll have no way of getting the troublemakers out of school. I just hope we'll be able to put them all in your class." And with that, Johnson stormed off to class.

As he slowly finished his coffee, Jim Steward wondered whether there was some truth in what Johnson said. Are students less responsible these days? Should students be able to demand a formal hearing before being suspended or expelled? How much due process should we have in the schools? Is there a danger that schools could get too legalistic?

What do you think?

The Goss Case:* When Is Due Process Recognized?

Dwight Lopez was a high school student from Columbus, Ohio. In 1971, he was suspended in connection with a disturbance in the lunchroom which involved some damage to school property. About 75 other students were suspended from his school on the same day. Dwight claimed that he did not participate in the destructive conduct but was an innocent bystander. He was not told why he was suspended or what he was accused of doing; and he never had a hearing.

Dwight and eight other students who were also suspended without a hearing sued Columbus school officials for violating their rights to due process of law. Some of these students were suspended for proven acts of violence. Others, like Dwight, were suspended although they claimed to be innocent of any wrongdoing, and no evidence was presented against them. All were suspended for brief periods of up to ten days.

The school administration argued that due process should not apply to cases of short suspension. Since the U.S. Constitution does not guarantee a right to an education, suspensions do not violate any basic right. Rather suspension is one of the punishments that can be very useful in maintaining school discipline. But requiring due process before every suspension would force administrators to spend so much time conducting hearings that they would not have time to do much else. Furthermore, innocent students are rarely suspended. And even if a mistake is made, it could be solved better through conferences between parents, students, and school officials, than by requiring due process procedures in all cases.

1. Should students have a right to due process before being suspended for less than 10 days?

2. If a judge says that students are entitled to due process, what does that mean? Should courtroom procedures be applied in school? What are the advantages and disadvantages of these procedures?

3. Which punishments do you believe are serious enough to require due process? Or should students have a right to due process before any punishment?

**Goss v. Lopez,* 419 U.S. 565 (1975).

The Opinion of the Court

Justice White first pointed out that students cannot be expelled without due process. He acknowledged that the U.S. Constitution does not grant a right to education. But he explained that the Fourteenth Amendment forbids the states from depriving "*any person of life, liberty* or property without due process of law." If states establish public schools, as New York has done, students have a "property" right in their education which may not be withdrawn on grounds of misconduct without "fundamentally fair procedures."

Second, the Court held that the Due Process Clause applies to cases of short suspension. A suspension for up to 10 days is not so minor a punishment that it may be imposed "in complete disregard of the Due Process Clause," Justice White wrote. "The total exclusion from the educational process for more than a trivial period is a serious event in the life of the suspended child." The students in this case were suspended based on charges of misconduct which, if recorded, could damage their standing with their teachers and "interfere with later opportunities for higher education and employment."

The Court then turned to the question of what due process means. Justice White noted that due process is a flexible and practical concept—it does not require a rigid set of procedures to be applied in all situations. However, it requires at least that no one should be deprived of life, liberty, or property without being informed of the charges against him and given an opportunity to be heard. "At the very minimum, therefore, students facing suspension . . . must be given some kind of notice and afforded some kind of hearing."

The Court then explained the kind of informal notice and hearing that is required in connection with a suspension of 10 days or less: "that the student is given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Due process, concluded the Court, "requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary expulsion from school."

The Court recognized, however, that there are school emergencies in which prior notice and hearings would not be required, particularly when there are dangers to persons or property. In such cases, the Court only required that fair procedures be followed "as soon as practicable" after removal of the danger of disruption.

Does this decision mean that schools will now be required to establish formal, lengthy procedures for all suspension? Not at all. For example, there does not have to be any delay between the time notice is given and the time of the hearing. "In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred."

In cases of short suspension, the ruling does not require that students be given an opportunity to secure a lawyer or to call and cross-examine witnesses. But it will reduce the risk of error by alerting administrators to disputed facts which might lead them to investigate further and perhaps call the accuser and witnesses. Indeed, the procedures required by the Court are "less than a fair-minded school principal would impose upon himself," Justice White noted.

In short, the minimum procedures required by *Goss* can guard against error without too much cost or interference with the educational process. "It would be a strange disciplinary system," observed Justice White, if a school did not try to inform a student of his misconduct and "let him tell his side of the story in order to make sure that an injustice is not done."

NOTE: Although no school can provide less due process than the Supreme Court requires, state governments and local school districts can provide additional procedural rights. This is the case in New York State. Under state law, short-term suspension applies to any exclusion from school for 5 days or less. Before such a suspension, students are entitled to the three elements of due process required by *Goss:* (a) oral or written notice of the charges; (b) if the student denies the charges; an explanation of the evidence against him; and (c) an opportunity to present his side of the story.

In addition, under New York law, the student and parent have a right to "an informal conference with the principal" at which time the parent may ask questions of the witnesses who made the complaint. Furthermore, many school districts require administrators to promptly notify the parents of students who are suspended—usually by telephone—followed by a letter.

What procedures are required in cases of long suspension or expulsion?

Although the Supreme Court did not rule on this question in *Goss*, it has indicated that long suspensions or expulsions "may require more formal procedures." This is because due process is a flexible concept that varies according to the possible seriousness of the penalty. When the punishment may be more serious, procedural protections should be more thorough.

In many states, these procedures have been determined by local courts or school boards. But in New York, the State *Guidelines* and Education Law (Section 3214) spell out the detailed rights a student must be given before he can be suspended for more than five days. Specifically, the student and his parent have. (1) the right to "a fair hearing;" (2) "reasonable notice" about the hearing; (3) "the right of representation by counsel;" (4) "the right to cross-examine witnesses;" and (5) "the right to present witnesses and other evidence on his behalf." In addition, the law provides that "a record of the hearing shall be maintained" (either by a stenographer or a tape recorder) which a student can use if he appeals.

If a school official violates a student's constitutional rights, can the student sue for money damages?

This question was considered by the Supreme Court in the case of *Wood v. Strickland* in which two students were suspended for three months without due process for spiking the punch at a school dance.** The administrators and school board members said they did what they thought was right and did not intend to violate the students' rights. But the Supreme Court ruled that sincerity or ignorance of the law did not excuse their action.

***Wood v. Strickland,* 420 U.S. 308 (1975).

The Court explained that a person who is responsible for supervising students cannot justify violating their rights because he is uninformed about the law. On the contrary, school personnel who discipline students must be expected to act with good intentions *and* with knowledge of basic student rights. Therefore, the Court ruled that a school official is not free from liability for damages "if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the students affected."

When a student's rights are violated, how will the amount of damages be decided?

In 1978, the Supreme Court answered this question in a case involving two Chicago students who were suspended for 20 days without due process.*** Neither student introduced evidence to show any actual damages they had suffered as a result of their suspension. Their lawyer argued that they should be awarded substantial damages because they were deprived of their constitutional rights, whether or not they suffered any injury. But the Supreme Court disagreed.

The Court ruled that when a student is deprived of his constitutional rights, the amount of money damages should depend on the circumstances of the case. A student should be awarded substantial damages: (1) to deter or punish school officials who *intentionally* deprive him of his rights; or (2) to compensate him for *actual* injury (which can include "mental and emotional distress" as well as financial loss). But where the violation is not intentional and no actual injury is shown, then the student is only entitled to "the award of a nominal sum of money," like one dollar.

Summary

The Constitutional protection against being deprived of life, liberty or property without due process applies to students in the public school. Due process is a flexible, legal concept that requires fair procedures. The procedures that are due a student vary according to the possible seriousness of the penalties. When the punishment may be more serious, a student is entitled to more thorough procedure.

Due process applies to all cases of suspension and expulsion. In cases of short suspension, a student has the right to know the charges and evidence against him and should have a chance to tell his side of the story. In cases of suspension for more than 5 days, New York law provides detailed procedural rights for students. These include the right to notice and a hearing, representation by counsel, the right to present and cross-examine witnesses, and the right to appeal.

If a student is deprived of his constitutional rights, he can sue school officials for money damages if they knew or should have known that they were violating his rights. But the damages he can collect depend on the circumstances of the case. A student will collect nominal damages for any violation of his rights. He may collect substantial damages only if he can show that he was actually injured or that school officials intended to deprive him of his rights.

****** *Carey v. Piphas,* 46 Law Week 4224 (1978).

8. The Case Method: Goals, Features, and Variations

from *Law in the Classroom*, Mary Jane Turner, Social Science Education Consortium, 1979

This 223-page handbook was designed as a practical resource for attorneys, judges, and other professionals in the justice system who will be making presentations about law and the legal system in the schools. The handbook contains scores of activities and learning strategies that can be used with different types of legal content. Most of the handbook consists of reprints of materials that have been published by experts in law-related education and used successfully throughout the country. The book is available from Social Science Education Consortium, 855 Broadway, Boulder, Colorado 80302, (303) 492-8154.

The following excerpts on Case Studies are from "Part 2: Strategies," which also includes materials on mock trials, moot courts, pro-se court, games, and field trips.

CASE STUDIES

Guidelines For Using Case Studies

In using legal case studies with students, attorneys and other resource people must be careful to use terms and situations that are familiar to students. While it is useful for such resource persons to have basic grounding in law, the underlying issues and conflicts inherent in legal cases may be more important than the particular decisions or statutes involved. The following discussion, which was prepared for teachers, contains suggestions and guidelines for structuring case studies as well as a rationale for using them in a classroom setting.

From the very beginning, the successful use of the case method approach to the study of law has involved three essential ingredients: 1) *lively* cases, 2) *capable* instructors, and 3) *involved* students. The selection of appropriate legal cases has been a crucial aspect of the approach. Not every case involving a legal decision or interpretation can be considered a "good" case. Cases that are chosen must center upon significant legal questions that persist and recur in human experience and the law. The cases must also pose a variety of possible alternative solutions and provide dramatic interest for the student.

The instructor, in turn, must be properly prepared and well informed on the subject if the approach is to be utilized successfully. The instructor must serve as a facilitator rather than as an authority figure in the learning process. Through the use of questioning, the instructor raises doubt in students' minds on a particular legal issue. This procedure helps to clarify student thinking and reasoning and assists the students in resolving the conflict. The instructor should judiciously avoid imposing conclusions or personal biases upon students. When a particular position has not been adequately considered, the instructor may express a point of view to the class, but it should be identified as such.

Finally, the active involvement of the student in analyzing a legal case is crucial to the approach. Participating in class discussions in which a particular legal problem is identified and sides are taken, points of view are stated, considered and weighed, and decisions are formulated and evaluated, remains the primary means by which students develop their own critical thinking ability. This is how an understanding of the law evolves from the case method of teaching.

The case study approach to the teaching of legal concepts and issues encourages teacher and students to engage in one or more of the following activities: (1) a statement or review of all the facts of a particular case; (2) an investigation or treatment of the issues and arguments of that case; and (3) an analysis or consideration of the decision, including the legal reasoning behind and implications of the ruling.

Case Method Activity Sequence

Step 1: Review of the Facts
- —What are significant facts in the case?

Step 2: Investigation of Issues/Arguments
- —What legal issues are involved?
- —What arguments might be presented?

Step 3: Consideration of Decision and Reasoning
- —What would you decide? Why?
- —What was the court's decision?
- —Why did the court come to that conclusion rather than another one?

As a discussion leader, an instructor utilizing the case method approach must provide the class with the necessary background information and materials they need. He or she should pose questions that encourage students to: (1) rationally examine a case—facts, issues, arguments, decision; (2) express and explore, as well as be able to explain and support, alternative points of view; (3) focus upon points of major importance and reflect upon the consequences of each; and, perhaps most important, (4) clarify their own thinking and values. Questions should promote the interchange of ideas among students and call for student thought rather than simple "yes/no" responses or the repetition of facts. The classroom questions should point out assumptions or weaknesses in reasoning, have a logical sequence or rational order, be clear and direct, and be within the answering capabilities of the students. In addition, questions should build on the class' preceding responses and ideas as well as its initial interests.

In addition to performing the roles of diagnostician and discussion leader, the teacher must act as a "climate-maker." That is, the teacher must develop and maintain a friendly,

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and non-threatening classroom environment in which students are encouraged to think logically, to consider alternatives freely, and to express themselves honestly while studying a case. In order to develop a favorable classroom atmosphere in which to use the case study approach, the teacher must refrain from dominating class discussion by repeating, commenting on, or asking questions of the same respondent following each remark. Rather, questions and comments should be redirected to other members of the group or class. Also biases of the instructor regarding a case should be contained and when they are expressed, they should be clearly open to class review and analysis.

By capably serving as diagnostician, discussion leader, and "climate-maker" in the case study approach, the teacher plays a key role in the instructional process. In performing these functions, the teacher is the primary guide to productive learning about the law.

The procedures described below provide several examples of how legal cases might be used to promote discussion in the classroom. More specifically, these procedures are designed to (1) illustrate how the case approach lends itself to a variety of teaching styles and uses; (2) demonstrate how this approach encourages student thinking at the higher cognitive levels of analysis, synthesis, and evaluation; and (3) suggest several legal cases and concepts that might be examined by social studies classes.

One way in which an instructor can promote the study of a legal case is to provide the class with a handout describing the facts, issues, arguments, court reasoning, and decision. After asking several questions designed to test general comprehension of the information contained in the handout, the teacher should center the discussion on student evaluation of the decision. These procedures are outlined in Diagram 1 which follows:

DIAGRAM 1

Students Given Entire Case

Student Case Handout Includes:

1. Facts
2. Issues
3. Arguments
4. Reasoning
5. Decision

Class Discussion Centers On:

1. Ascertaining student comprehension of the facts, issues, arguments, decision included in handout
2. Student evaluation of court decision and reasoning.

A second way a teacher might use a legal case in the classroom is to give the students a handout describing only the facts, the issues, and the arguments. In contrast to the first set of procedures, the teacher asks the students to reach their own decision on the case in light of the arguments and facts presented to them in the handout. Finally, the actual court's decision and reasoning in the case is introduced and compared with the students' position. These procedures are outlined below in Diagram 2:

DIAGRAM 2

Students Given Only Case Facts, Issues, Arguments

Student Case Handout Includes:

1. Facts
2. Issues
3. Arguments

Class Discussion Centers On:

1. Ascertaining student comprehension of facts, arguments (included in the handout)
2. Student formulation and evaluation of court decision and reasoning.

An alternative strategy for encouraging class discussion of the court's decision and reasoning is to provide the students with a handout describing the facts, issues, and arguments of a case along with unmarked quotes taken from the majority decision and dissenting opinions. After posing several questions designed to test student understanding of the material contained in the handout, the teacher asks the students to select the opinion with which they most agree and to give reasons for their choice. These procedures are outlined in Diagram 3:

DIAGRAM 3

Students Given Unmarked Opinions

Student Case Handout Includes:

1. Facts, issues, arguments
2. Unmarked judicial opinions.

Class Discussion Centers On;

1. Ascertaining student comprehension of the facts, issues, opinions
2. Student selection/justification/evaluation of court opinion.

Perhaps the most challenging way in which a teacher can present a legal case to a class is to give the students only the facts of the case. Following some initial comprehension questions, the instructor asks the students to identify the issue(s) involved in the case, to develop arguments for both sides, and to decide the case on the basis of the arguments. This procedure is outlined below in Diagram 4:

DIAGRAM 4

Students Given Only the Facts

Student Case Handout Includes:

1. Facts

Class Discussion Centers On:

1. Ascertaining student comprehension of the facts (found in handout)
2. Promoting student identification of the issues, preparation of arguments, development of a decision, and evaluation of decision.

An alternative strategy to having the entire class develop arguments for both sides would be to divide the class into committees or "law firms" and have the firms prepare arguments for the plaintiff and defendant. Their arguments can then be presented to the class for consideration and discussion.

Although the case study approach has a number of distinct advantages for classroom use, it is not without its limitations as an instructional method. For example, the case approach assumes that the students possess certain background information and that they will be able to comprehend the facts of the case under consideration. If these two conditions are not fulfilled, a lesson based upon a case study would be unproductive and frustrating to both teacher and students.

In addition, the case method approach requires that students make independent judgments regarding a particular legal case, problem, or issue. Students must also permit their judgments to be scrutinized and challenged. As a result, they may exhibit an initial hesitancy and/or inability to study a legal case or to critique each other's views. If student inhibitions do arise, and temporarily impede the educational process, a teacher's patience and guidance is needed to override the problem.

STRATEGIES FOR HELPING STUDENTS DEAL WITH FACTS, ISSUES, DECISIONS, AND OPINIONS

This resource expands the basic case-study approach by suggesting additional ways to help students differentiate between facts and opinions. A case-study sheet is also provided (Handout #1).

Facts

Students should be asked to list the facts in a case. They should be made aware of the importance of this exercise, since everything else in the case hinges on an accurate accounting of the facts involved. The teacher can ask his students to enumerate them according to the following categories:

a. Uncontroverted facts—those not subject to challenge or dispute (students should point to specific citations in the case).

b. Implied or inferred facts—those which logically follow the uncontroverted facts (students should justify the inferences or implications they have made; they may not be right, but at least they should be reasonable assumptions).

c. Missing facts—other things, which one needs to know before reaching a decision, that were not stated in the case.

d. Important facts—as opposed to irrelevant or inconsequential facts.

A number of strategies can be used in presenting the facts. Sometimes the teacher may want to provide the students initially with only the facts, even though a case has been adjudicated, so that students are free to form their own opinions. The court decisions can be handed out later and a discussion held as to why student decisions differ from the court's verdict, if in fact they do.

Before class, the teacher could prepare a tape recording stating the facts of the case, and play it more than once in class to illustrate what really are uncontroverted facts. Did students *perhaps hear the tape differently? A* variation on this approach would be to use a few students to create a videotape or role play depicting the facts. This simulates a real-life situation because student witnesses to the facts must try to report them accurately, with possible conflicting testimony.

Issues

It is essential to zero in on the issues involved in a case, so that far-ranging bull sessions, which take up precious class discussion time, can be avoided. Issues can be phrased in terms of "whether or not" statements. The resource person may have to exercise patience in stressing the need to adhere to the stated facts in the case and to the principal issue or issues. Students not only are being led toward a substantive conclusion but are also moving toward a wider awareness of the scope and limits of free expression.

A useful approach to a case study is to examine the question of *interested parties*. Law is a compromise of competing interests. Ask who the competing parties are in the outcome of a case. What is each person's or group's interest? (e.g., students, parents, school board, administration, civil liberties groups, community.) How would each one like the case resolved? Why? How can a decision be reached (if, in fact, that is possible) which takes into account all of these interests? To depict the balance of conflicting issues in the case, the teacher can also draw a set of scales on the blackboard or an overhead transparency and then visually weigh the arguments for the plaintiff and for the defendant as the students define them.

Decision and Opinion(s)

The *decision* in a case is a simple "yes" or "no" response to the central issue. Decision making is an everyday happening in law. It is a challenging lessons to students that a decision must be made to resolve the problem—someone will win and someone will lose. The decision not only affects the individual(s) involved, it also sets a precedent for future similar cases. The *opinion* must include both the reasoning or justification for the decision and an explanation of why the opinion disagrees with or can refute other points of view. This reasoning provides the student with an appreciation of precedent and an understanding of various legal concepts. Alert students to the possibilities for varying interpretations of the law by judges. As court opinions are read and discussed, distinctions should be noted between real statements of law and judges' expressions of "obiter dicta" (incidental

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Excerpted with permission from *Juvenile Justice: A High School Curriculum Guide* (Sewell, N.J.: Institute for Political/Legal Education, 1974), pp. 4-6.

or collateral opinions which are not necessary to support the decision and not binding). Also, there may be value in examining minority *dissenting* opinions (if the decision was not unanimous) or *concurring* opinions. Justices often write *concurring opinions* when they agree with the majority decision but for different reasons and wish to indicate that they might decide differently under other circumstances.

Handout 1

CASE STUDY SHEET

Student's Name ________________________

Course ________________________

Date ________________________

Case name ________________________

Court ________________________

Decision date ________________________

Facts:

Legal Issues:

Decision:

Court's Reasoning:

Student's Comment:

Reprinted with permission from *The Role of Law in Society and the Rights and Responsibilities of Citizenship: A Curriculum Guide for Kindergarten Through Grade 12* (Jefferson City, Mo.: Missouri Bar Association Advisory Committee on Citizenship Education and Missouri Department of Elementary and Secondary Education, 1976).

APPENDIX

List of Resources for Educators, Lawyers, and Law Students for Use in Secondary Classrooms

This Appendix contains a list of law-related education leaders, prepared by the American Bar Association, who can direct you to LRE programs and resources in their respective states. Moreover those entries marked with an asterisk(*) are conducting programs in other states and can provide information about such activities. For a more complete listing of LRE projects, contact the ABA Special Committee on Youth Education for Citizenship, 1155 East 60th Street, Chicago, Illinois 60637, 312/947-3960.

Special mention is made of the ABA because of its material coordinating role in LRE and of the Constitutional Rights Foundation because of its pioneering work with lawyers in the classroom.

Norman Gross, Staff Director
Special Committee on Youth Education for Citizenship
American Bar Association
1155 E. 60th Street
Chicago, Illinois 60637
(312) 947-3960

Since 1971, the ABA has served as a national clearinghouse and coordinator in law-related education. The ABA can inform you of the wide range of programs, materials, and resources which are available in all parts of the country. Its publications include the periodical, *Update on Law-Related Education,* which reports on recent Supreme Court decisions, innovative classroom strategies, and important developments in the law and law-related education. Each issue also includes a review of newly available elementary and secondary curriculum and resource materials. The ABA's curriculum catalogs—the *Bibliography, Media* and *Gaming*—describe more than 1,500 materials for classrooms, K-12. The most recent of its publications on program development, *Building Bridges to the Law,* explains how to use lawyers, judges, law enforcement officers, and other community resources in your law-related education program. Its newsletter, *LRE Report,* will keep you current on developments in LRE. The ABA also (1) provides consulting and clearinghouse services, (2) conducts a variety of seminars and institutes, and (3) can direct you to LRE programs in your community.

Vivian Monroe, Executive Director
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The Lawyer-in-the-Classroom Program has developed a series of 19 lesson plans on a wide range of legal topics. Each set consists of a teacher, lawyer, and student lesson plan which includes several cases as well as innovative class activities to encourage students to think about particular legal issues. These 3-5 day mini-units include the following 19 titles and topics: Password: The Law and Bilingual Education; Students Are Also Citizens: Students' First Amendment Rights; Turnabout: University Admissions Policies; To Prosecute or Not: Crime-Charging Standards; No Vacancies: Environmental Protection; Gateway: Immigration Law; Workout: Labor Disputes; Roundtable: Employee Rights; Keep Out—Danger! Protecting Property with Dangerous Devices; Play Ball: Sex Discrimination in Sports; Do You Believe? The Right to Religious Freedom; Spare the Rod: Student Suspension Hearing Rights; With Interest It Comes to . . . Contracts and Credit; Satisfaction Guaranteed: Consumer Protection; We've Got You Covered: Worker's Compensation; Finders Keepers: Property Rights; Dignity: Sex Discrimination in Employment; Design for Life: Abortion, Parental and Paternal Consent; To Love and to Share: Living Together Without Marriage. These materials have been prepared by experienced classroom resource participants from the Los Angeles Bar Association.

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